TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS TRUSTEES UNDER THE WILL OF ARTHUR FRANCIS THOMAS COOPER, DECEASED, PETITIONERS,

vs.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,927)

(35,927)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, tenth circuit	*a*	1
Caption (omitted in printing)	*a*	
Record from district court of the United States, district of Wyoming	1	1
Caption (omitted in printing)	1	
Petition	1	1
Answer	4	4
Order suggesting the death of Christopher Barbour Collinson and directing that the action proceed	5	5
Order denying motion for statement and declaration of conclusion of law	6	6
Findings of fact and conclusions of law	6	6
Judgment	8	8

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1931

	Original	Print
Bill of exceptions	9	9
Caption	9	9
Offers in evidence	9	9
Motion to dismiss	10	10
Exhibit 1—Letter, dated August 5, 1925, Deputy Commissioner of Internal Revenue to estate of A. F. T. Cooper	11	10
Exhibit 2—Protest, dated August 27, 1925, referring to notice of August 5, 1925	15	15
Exhibit 3—Letter, dated November 24, 1925, Commissioner of Internal Revenue to estate of A. F. T. Cooper	17	17
Exhibit 4—Letter, dated March 20, 1926, N. E. Corthell to M. S. Reynolds, collector	19	19
Exhibit 5—Letter, dated July 27, 1926, N. E. Corthell to M. S. Reynolds, collector	20	20
Exhibit 6—Claim for refund of taxes	21	20
Exhibit 7—(By reference only)	22	22
Exhibit 8—Letter, dated May 18, 1929, Commissioner of Internal Revenue to M. E. Corthell	22	22
Exhibit 9—Letter, dated September 4, 1929, Commissioner of Internal Revenue to N. E. Corthell	24	23
Exhibit 10—Copy of original return of taxpayer	26	25
Motion for statement of conclusion of law	29	29
Findings of fact and conclusions of law	29	29
Approval of bill of exceptions	32	31
Stipulation re bill of exceptions	32	32
Petition for appeal	32	32
Order allowing appeal	33	33
Assignment of errors	33	33
Citation, Memorandum re	35	35
Election as to printing	35	35
Stipulation for transcript	35	36
Bond on appeal, Memorandum re	36	36
Judge's memorandum	37	36
Clerk's certificate (omitted in printing)	41	
Appearances (" " ")	43	
Order of submission (" " ")	43	
Opinion, Phillips, J	44	41
Judgment	47	44
Petition for rehearing (omitted in printing)	49	
Order denying petition for rehearing	55	44
Motion for suspension of mandate	55	45
Order staying mandate	55	45
Clerk's certificate (omitted in printing)	56	
Order allowing certiorari	57	45

[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. 1940. Civil

CHRISTOPHER BARBOUR COLLINSON, EDGAR PERCY LEWIS, and Richard F. Cooper, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, Plaintiffs,

vs.

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, Defendant

PETITION—Filed Sept. 20, 1929

The plaintiffs allege the following facts:

(1) During the taxable period from January 1st to December 12th, 1920, inclusive, N. E. Corthell, was the qualified and acting administrator of the estate of Arthur Francis Thomas Cooper, deceased, appointed by the District Court for the County of Albany, State of Wyoming.

(2) Thereafter, to-wit, on February 18th, 1921, said administrator made return to the Commissioner of Internal Revenue, showing gross and net income received on account of said estate, during the said taxable period. The net income shown on said return was Sixty-one Thousand One Hundred Seventy and 84/100 ($61,170.84) Dollars, and the indicated tax thereon was Thirteen Thousand Eighty-two and 61/100 ($13,082.61) Dollars.

(3) At the close of the said taxable period, said adminis-
[fol. 2] trator made final settlement of his account, which were approved by said court, and a decree of distribution of said estate was made, under which the said estate was distributed to the plaintiffs, as trustees, under the Will of said Cooper, and the said administrator was discharged and the said estate closed.

(4) Thereafter, to-wit, on March 14, 1921, the plaintiffs paid to the Collector of Internal Revenue, at Cheyenne, Wyoming, the said sum of Thirteen Thousand Eighty-two and 61/100 ($13,082.61) Dollars in full settlement of the said tax.

(5) During the said taxable period, the administrator in the progress of said administration paid out and expended certain sums of money, among which were the following, to-wit:

Cost of Publishing Notices (incident to final set-ment)	$67.52
Probate fees (on final settlement)	26.00
Administrator's bond premium (Aug. 4 to Dec. 12, 1920	105.55
State of Wyoming Inheritance Tax upon said estate	16,870.00
	$17,069.07

The administrator, on said return, claimed and took sundry deductions from gross income, including the items of disbursement aforesaid. The administrator further for the purposes of the normal tax, deducted from the net income on said return, a specific credit of One Thousand ($1,000.00) Dollars. The administrator further computed and paid normal tax on the first Four Thousand ($4,000.00) Dollars of net income shown on said return, at the rate of four (4%) per cent and on the balance of net income at the rate of eight (8%) per cent.

(6) On November 24th, 1925, the Commissioner of Internal Revenue assessed and determined the income tax upon said return. In such determination, the Commissioner disallowed the deductions for disbursements claimed as aforesaid, disallowed the specific credit so claimed, and computed [fol. 3] the tax on the first Four Thousand ($4000.00) Dollars of net income at eight (8%) per cent, instead of four (4%) per cent; and thereupon determined and assessed a deficiency income tax upon said return of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars.

(7) Thereafter, to-wit, on March 21, 1926, the defendant notified the administrator of such assessment and de-

manded payment of the same; whereupon, the plaintiffs, under duress and compulsion and protest, paid to the defendant the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars, in discharge of said deficiency tax.

(8) The plaintiffs allege that the disallowance of said deductions was unauthorized and unlawful; that the administrator was entitled to claim and take the same in determining the net income of said estate; and that the deficiency tax determined and assessed against said estate, based on the disallowance of such deductions, was unauthorized and unlawful. The plaintiffs, therefor-, allege that, to-wit, on March 21, 1926, the defendant in manner aforesaid, became and was indebted to the plaintiffs for moneys then had and received by the defendant from the plaintiffs to the use of the plaintiffs in the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16), which said sum was then and there due and payable from the defendant to the plaintiffs; and that no part of said indebtedness has been paid.

(9) On July 27, 1926, plaintiffs made application to the defendant, and the Commissioner of Internal Revenue, for the refund of the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars, and demanded payment thereof; and thereafter, to-wit, on September 4, 1929, such application and demand were refused.

Wherefore the plaintiffs pray judgment against the defendant for the recovery of the said sum of Seven Thousand Two Hundred Ninety-seven and 16/100 ($7297.16) Dollars, together with interest thereon at the rate of six (6%) per cent per annum, from March 21, 1926, and for costs and all other proper relief.

Corthell, McCullough & Corthell, Plaintiffs' Attorneys.

[fol. 4] *Duly sworn to by N. E. Corthell. Jurat omitted in printing.*

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Feb. 5, 1930

For answer to the petition herein, defendant says:

(1) Defendant admits the allegations of paragraph one of the petition.

(2) Defendant admits the allegations of paragraph two of the petition.

(3) Defendant is without knowledge as to the facts set forth in paragraph three of the petition and demands strict proof of each and every allegation thereof.

(4) Defendant admits that the sum set forth in paragraph four of the petition was paid on or about the date alleged but denies that said payment was in full settlement of said tax.

(5) Defendant denies the allegations of paragraph five of the petition.

(6) Defendant admits that an additional assessment of $7,297.16 was made by the Commissioner of Internal Revenue on or about the date alleged but denies the basis alleged by plaintiffs for said additional assessment.

(7) Defendant admits the payment of the sum alleged in paragraph seven of the petition on or about the date alleged but denies that the payment was made in the manner alleged in said paragraph.

(8) Defendant denies each and every of the allegations of paragraph eight of the petition.

[fol. 5] (9) Defendant denies the allegations of paragraph nine of the petition.

Wherefore defendant demands judgment that the petition be dismissed and for costs herein.

Albert D. Walton, U. S. Attorney and Attorney for Defendant.

evp.

UNITED STATES OF AMERICA,
District of Wyoming, ss:

Albert D. Walton, being first duly sworn, upon his oath deposes and says that he is the duly appointed, qualified and acting United States Attorney for the District of Wyoming, and as such is attorney for the defendant in the above entitled cause; that he has read the above and foregoing answer and knows the contents therein contained and that all of the facts therein stated and allegations therein contained are true as he verily believes.

Albert D. Walton.

Subscribed in my presence and sworn to before me this 5th day of February, A. D. 1930. Capitola G. Allison, Deputy Clerk, U. S. District Court, District of Wyoming.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER SUGGESTING DEATH OF CHRISTOPHER BARBOUR COLLINSON AND DIRECTING THAT THE ACTION PROCEED—Filed Aug. 29, 1930

It appearing to the court, upon the suggestion of Edgar Percy Lewis and Richard F. Cooper, as surviving trustees under the Will of Arthur Francis Thomas Cooper, Deceased, that on June 5th, 1930, Christopher Barbour Collinson, one of the original trustees, departed this life; and

It further appearing to the court from such suggestion that all rights and powers of said Chritopher Barbour Collinson survived and passed to the surviving trustees aforesaid;

It is, therefore, ordered that this action proceed as the action of Edgar Percy Lewis and Richard F. Cooper, as trustees under the Will of Arthur Francis Thomas Cooper, [fol. 6] Deceased, Plaintiffs, against the defendant Marshall S. Reynolds, Individually, and as Collector of Internal Revenue.

Dated this 29th day of Aug., 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR STATEMENT AND DECLARATION OF CONCLUSION OF LAW—Filed Aug. 29, 1930

This Cause coming on to be heard before the court this day, upon the motion of the plaintiffs for a statement and declaration of conclusion of law, the plaintiffs appearing by N. E. Corthell, their attorney, and the defendant appearing by Albert D. Walton, his attorney, and the court having heard the argument of counsel and being fully advised:

It is ordered that the said motion be denied, to which order and ruling of the court the plaintiffs except.

Done in open court this 29 day of August, 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Filed Aug. 29, 1930

This action came on regulary to be tried before the Court without a jury, due waiver of a jury in writing having been filed herein, and the parties appearing by their respective counsel, and the Court having heard and considered the evidence and argument of counsel and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I. That Arthur Francis Thomas Cooper died on or about December 8, 1918, and N. E. Corthell was appointed and duly qualified and acted as administrator of the estate of the decedent. That on or about February 8, 1921, the said administrator on behalf of said estate filed with the Commissioner of Internal Revenue a federal income tax return for the said estate for the taxable period starting January [fol. 7] 1st, and ending December 12, 1920. That final settlement of the said estate was made on December 12, 1920, and at that time the said estate was distributed to the trus-

tees under the Will of the said decedent and the administrator discharged and the estate closed.

II. That the trustees under the Will of Arthur Francis Thomas Cooper, deceased, to whom such distribution was made were Christopher Barbour Collinson, Edgar Percy Lewis, and Richard F. Cooper, the plaintiffs herein.

III. That Marshall S. Reynolds is the United States Collector of Internal Revenue for the District of Wyoming and the tax here in controversy was paid to him as such official.

IV. That the income tax return for the said estate filed as hereinabove set out showed a tax liability of $13,082.61, which sum was paid. In determining this tax, deductions from gross income of the estate for attorney's fees, in the sum of $20,750.00 and for Wyoming inheritance tax in the sum of $16,870.00, which sums had been paid by the administrator, were claimed.

V. In March, 1923, an Internal Revenue Agent, after an investigation of the said estate, recommended the disallowance of both of these claimed deductions. In August, 1925, the Commissioner notified the taxpayer of the deficiency in tax amounting to $17,601.15, based upon the report of the said Revenue Agent, following which the taxpayer filed a protest. Upon consideration of the matter as presented by the protest, and in November, 1925, the said Commissioner made a redetermination of the tax and found that the greater portion of the deduction of $20,750.00 represented a business expense of the estate, and allowed that sum as a deduction, but adhered to his disallowance for the Wyoming State Inheritance Tax in the sum of $16,870,00, holding that such payment, although made by the administrator, was deductible only by the beneficiaries of the estate, and determined the additional tax liability on this basis to be $7,297.16, which amount was paid by the plaintiffs on March 20, 1926. On July 29, 1926, the taxpayer filed a claim for refund of such additional tax.

VI. On May 18, 1929, the Commissioner of Internal Reve-
[fol. 8] nue rejected the claim for refund filed on July 29, 1926, as above set out, and so notified the representatives of the estate, and at the same time further advised the administrator of the estate that the amount of the inheritance tax paid to the State of Wyoming was allowed as a deduc-

tion from gross income for the year 1920 in accordance with Section 703 of the Revenue Act of 1928, that the personal exemption of $1,000.00 was also allowed and that the normal tax on the first $4,000.00 of taxable income was computed at 4% instead of at 8%; that the attorney's fees in the sum of $20,750.00 which had been claimed as a deduction in the return was disallowed, that the correct computation of the tax resulting from the foregoing adjustments resulted in an increase in the additional tax, that is, in excess of the sum of $7,297.16, in the amount of $1,567.19, but that the collection of this excess was barred by the statute of limitations and no attempt to collect it was made.

VII. Thereafter this suit was filed by the trustees. The other small items included in the protest of payment were waived upon the trial and the matter was presented to the Court solely upon the action of the Commissioner as it affects and concerns the claimed deductions for attorney's fees and Wyoming inheritance tax.

Conclusions of Law

I. The income tax collected by the defendant from the estate of Arthur Francis Thomas Cooper, deceased, for the year 1920 is correct and in accordance with law.

II. The defendant is entitled to judgment for his costs and disbursements herein.

To each of which Conclusions of Law the plaintiffs except.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

In United States District Court

Judgment—Filed Aug. 29, 1930

And now, based on the Findings of Fact and Conclusions of Law heretofore made and entered herein, it is ordered and adjudged that the defendant have and recover judgment [fol. 9] against the plaintiffs herein for his costs and disbursements herein, to be taxed.

To which judgment the plaintiffs except.
Dated this 29th day of August, A. D. 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Aug. 29, 1930

CAPTION

Be it remembered that on the 27th day of May, 1930, at ten o'clock A. M. of said day, the above entitled matter came on for final hearing before the court, N. E. Corthell, Esquire, appearing as attorney for the plaintiff, and Honorable Albert D. Walton, United States Attorney for the District of Wyoming, and Honorable John R. Wheeler, appearing on behalf of the defendant. After opening statements by counsel the following proceedings were had:

By Mr. Corthell: Paragraphs 1, 2, and 3 of the petition are admitted. Paragraph 4 of the petition is admitted except the statement at the end that payment was in full of tax. Paragraph 5 is admitted that during the taxable period in 1920 covered by this return the administrator in the progress of said administration paid out among other sums $16,870.00 to the State of Wyoming as inheritance tax on the transmission of said estate. It is also admitted that the administrator in said return claimed and took a deduction including the disbursement of $16,870.00. It is also admitted that the administrator for the purpose of the normal tax deducted from net income a special credit of $1,000.00. It is admitted that the administrator further on said return computed and paid the normal tax on the first $4,000.00 of the net income at the rate of 4 per cent and on the balance of net income at the rate of 8 per cent.

OFFERS IN EVIDENCE

We now offer in evidence as Exhibit No. 1 copy of a letter dated August 5, 1925, from the Deputy Commissioner addressed to the Estate of A. F. T. Cooper, Laramie, Wyoming.

We now offer in evidence as Exhibit No. 2 a copy of [fol. 10] protest dated August 27, 1925, and referring to the notice of August 5, 1925,

We offer in evidence as Exhibit No. 3 Commissioner's letter dated November 24, 1925.

We offer in evidence as Exhibit No. 4, a copy of the letter dated March 20, 1926, addressed to Marshall S. Reynolds, Collector of Internal Revenue.

We offer in evidence as Exhibit No. 5, copy of a letter dated July 27, 1926, and addressed to M. S. Reynolds, Collector of Internal Revenue.

We offer in evidence as Exhibit No. 6, photostatic copy of application for refund.

We offer in evidence as Exhibit No. 7 photostatic copy of brief in support of claim.

Mr. Wheeler: I object to the introduction of the brief on the ground that it is purely argumentative.

By the Court: The objection is overruled.

By Mr. Corthell: We now offer in evidence as Exhibit No. 8 photostatic copy of a letter from the Commissioner dated May 18, 1929.

We offer in evidence as Exhibit No. 9 photostatic copy of a letter from the Commissioner dated September 4, 1929.

We also offer in evidence as Exhibit No. 10 photostatic copy of the original return of the taxpayer.

As to paragraph 7 of the petition it is admitted that the deficiency tax of $7,297.16 was on March 23, 1926, paid by the plaintiff to the defendant under protest.

Motion to Dismiss

By Mr. Wheeler: The evidence as introduced by the plaintiff also shows the Government's case. I desire at this time to move for judgment of dismissal of the plaintiffs' case upon the evidence submitted.

By the Court: Overruled.

[fol. 11] **Exhibit 1**

Exhibit No. 1 is a form letter from the Deputy Commissioner of Internal Revenue, addressed to Estate of A. F. T. Cooper, reading:

"An audit of your income tax return filed for the taxable year 1920, disclosed a deficiency in tax amounting to $17,601.15. This deficiency is the result of certain adjustments which are shown in the attached statement."

The letter allows thirty (30) days to present a protest and details the procedure prescribed. The following statement is attached.

"Statement

IT:PA:4. GWF:406

In re Estate of A. F. T. Cooper, Laramie, Wyoming

Year, 1920; Deficiency in Tax, $17,601.15

The adjustment recommended by the examining officer in his report dated March 19, 1923, have been approved as submitted.

Due consideration has been given your protest of April 5, 1923, but no change has been made in the audit as recommended by the examining officer.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

In the event that you do not acquiesce in this determination of your tax lability, any protest submitted must be signed and sworn to by you.

Payment of the tax in question should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him."

There is also attached a report of the Revenue Agent in Charge, dated March 19, 1923, relating to the years 1919 and 1920, indicating no change in the assessment except an additional tax of $17,601.15 for 1920, which is recommended as the result of an investigation.

[fol. 12] Also attached is the report of A. L. Maple, examining officer, recommending as the principal changes, "Wyoming Inheritance tax disallowed. Attorney's fees for estate disallowed." This report deals in some detail with the history of the estate, the nature of the property, and

the method of determining depletion charges on oil properties which are found to be substantially correct. A statement of the "Block Adjustments" for the taxable year 1919 is appended indicating no change; also, the following statement of "Block Adjustment" for 1920:

Schedule 3. Block Adjustment. 12/31/1920

Block	Per original	Additions to income	Deductions from income	Amended
E	59,560.20	37,819.07	.....	97,379.27
G	1,353.21	.....	.....	1,353.21
J	257.43	.....	.....	257.43
L	61,170.84	.....	.....	98,989.91

Schedule 3-A, Explanation of Items

Block E

Analysis of Net Amount in this Block per Original

Gross income from royalties		293,282.61
Less:		
Depletion	81,710.53	
Expenses of Trustees	3,730.02	
Geological investigations and supplies, tools	869.00	
Administration Expenses:		
Publishing notices	67.52	
Probate fees	26.00	
Admr. bond premium	105.55	
Attorney's fees	20,750.00	
Taxes:		
State and County	201.04	
Production tax	340.51	
U. S. Federal Estate Tax	109,047.24	
Wyoming Inheritance Tax	16,870.00	
Clerical Services	5.00	
		233,722.41
Net amount per original return		59,560.20

[fol. 13] Items Disallowed in Amended Administration Expenses

1. Publishing notices	67.52
2. Probate fees	26.00
3. Admr. bond premium	105.55
4. Attorney's fees	20,750.00
5. Wyoming Inheritance tax	16,870.00
Total addition to income	37,819.07

Nos. 1, 2 and 3 are expenses in connection with the administration of the estate and are unallowable deductions from income under Art. 293 of Reg. 45.

The report continues:

"No. 4. Attorney's Fees

Mr. Corthell was asked if the attorney's fees were for services in connection with the administration of the estate or for services in the management of the property of the estate and his reply was that they were all in payment for services in connection with the administration of the estate. His attention was then called to Art. 293 wherein such expenses are not allowable deductions from income and also to Solicitor's Opinion 88 contained in Cumulative Bulletin #4 on page 119 wherein such expenses are discussed more fully. In the Solicitor's Opinion, a distinction is made between attorney's fees for services in connection with the administration of the estate and for services in connection with the operation of the business.

In this case, Mr. Corthell being both administrator for the estate and a member of the partnership of Corthell, McCollough and Corthell, who were the attorneys for the estate, not only attended to the affairs of administration but also collected the royalties and invested the proceeds until the estate was closed. He gave as his reason for deducting the amount from income on the original return, that he considered it an expense incident to the production of the income and a proper deduction therefrom. He also stated that attorney's fees had been disallowed by the Federal Estate Examiners in determining the value of the es-

tate subject to federal estate tax, for the reason that they had not been paid and the amount was indeterminable. He [fol. 14] stated, therefore, that inasmuch as they had not been considered for estate tax purposes, he considered it proper to deduct them from income for income tax purposes.

While it is true some services were rendered in the collection and investment of the income, it seems the major portion of the fees were in payment for services in connection with the administration of the estate. No information was available to show the proportionate amount applying to services rendered in connection with the management of the business of the estate.

Mr. Corthell intimated that he would contest the disallowance of this item and an attempt has been made to state the circumstances in detail as nearly as they could be determined for the information of the Department in future consideration of the matter.

Item 5

Wyoming Inheritance Tax in the amount of $16,870.00 deducted on the original return but disallowed under authority of IT 1474 contained in Bimonthly Digest No. 6 on page 58.

Depletion was computed in the same manner as in 1919 with the exception that the amended value of the oil rights as determined by the Federal Estate Examiners was used as the cost basis. As stated in letter accompanying report, this item is left undisturbed subject to the findings of the Department on the claim for depletion made by the Ohio Oil Company on the same property.

Expenses of Trustees

The trustees of the property lived in England and it was necessary for them to make two trips over here in connection with the management and operation of the property. Their expenses were paid in the amount of $3,730.02 which appeared to be a proper business expense.

Schedule 4. Computation of Tax. Dec. 31, 1920

Amended net income, Schedule 3		98,989.91
Less:		
Exemption	1,000	
Taxable int. on U. S. obligations	257.43	
		1,257.43
Income subject to normal tax		97,732.48
[fol. 15] Normal tax at 4% on	4,000.00	160.00
Normal tax at 8% on	93,732.48	7,498.60
Surtax on total net income	98,989.91	23,025.16
Total tax liability		30,683.76
Tax previously assessed		13,082.61
Additional tax due		17,601.15"

Exhibit No. 2 is a protest which is as follows:

EXHIBIT No. 2, PAGE 1

IT:PA:4. GWF:406.

Aug. 27, 1925.

The Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: Referring to your letter of August 5, 1915, relative to audit of Income Tax Return Estate of A. F. T. Cooper, deceased, for the taxable year 1920, indicating a deficiency tax amounting to $17,601.15, I submit herewith a request for a hearing with respect to the items stated below. Following are the particulars called for in your letter:

A. Estate of A. F. T. Cooper, N. E. Corthell, former Administrator, Laramie, Wyo.

C. B. Collison, E. P. Lewis, R. F. Cooper, Trustees, % N. E. Corthell, Laramie, Wyo.

C. Notice of Aug. 5, 1925. IT:PA:4, GWF:406.

D. The tax in dispute amounts to $17,601.15 covering the taxable year of 1920.

E. Exception is taken to the following items disallowed under Schedule 3-A of the Report of Mar. 19, 1923.

4. Attorney's fees	$20,750.00
5. Wyoming Inheritance Tax	16.870.00

F. 1. With respect to item 4, Attorney's fees, $20,750.00, [fol. 16] the statement in the report of the Investigator that "Mr. Corthell was asked if the attorney's fees were for services in connection with the administration of the Estate, or for services in the management of the property of the estate, and his reply was that they were all in payment for services in connection with the administr-tion of the Estate," is not true in fact. The payment in question was made as the result of an agreement between the Trustees and the attorneys covering a considerable variety of services rendered from the date of the death of A. F. T. Cooper in 1918 to the end of the year 1920. These services included advice from time to time concerning the operations of the lessee of the oil properties, negotiations and contracts for other oil leases, investigations and opinions concerning righ-s of inheritance under Statutes and treaties, and other special and particular services besides the general care and oversight of the interest of the Trustees and the beneficiaries in the estate. No occasion arose to apportion the payments between Probate expenses and other expenses connected with the Estate, and no attempt was made to do so. The taxpayers would willingly avail themselves of any opportunity to adjust and settle such apportionment for the purposes of the assessment.

2. The statement in the report of the investigator that "He (Mr. Corthell) also stated that attorney's fees had been disallowed by the Federal Estate Examiners in determining the value of the estate, subject to Federal estate tax," etc., is not true in fact. In submitting the report for the determination of the Estate tax, claim was made for the statutory commissions allowable to an administrator, but not for any of the attorney's fees involved in the payment above referred to, except an item of $750.00, which was disallowed. The claim for deduction of administrator's commissions was disallowed for the reason that the estate had not then been finally settled, nor any fees or commissions allowed or paid. In fact no commissions

were allowed or paid in the probate of the estate, but these services were taken into consideration in the final settlement of the Attorney's fees covered by the above payment.

3. The deduction of Wyoming Inheritance Tax $16,870 involves no disputed question of fact, as we understand it, but is purely a question of law. Reference is made for further amplifications of the grounds of these exceptions to [fol. 17] letter of the undersigned, addressed to the Commissioner of Internal Revenue, under date of Apr. 5, 1923, with respect to the assessment above referred to.

—— ——, Former Administrator A. F. T. Cooper Estate and Attorney for the Trustees Now Having Possession of the Estate.

STATE OF WYOMING,
County of Albany, ss:

I, N. E. Corthell, being first duly sworn say-: I have read the foregoing statements and, in so far as the same relate to matters of fact, the same are true to the best of my knowledge and belief.

—— ——.

Subscribed in my presence and sworn to before me this — day of August, 1925. —— ——, Notary Public.

EXHIBIT 3

Exhibit No. 3 is a form letter of the Commissioner, dated November 24th, 1925, addressed to Estate of A. F. T. Cooper, containing the following paragraph:

"The determination of the income tax liability of the Estate of A. F. T. Cooper for the taxable year 1920 as set forth in office letter dated August 5, 1925, has been changed to disclose a deficiency in tax amounting to $7,297.16. The adjustments made are explained in detail in the attached statement."

Following is an outline of the prescribed procedure for appeal, attached to which is the following statement:

"Statement

IT:PA:4-60D. GWF:406

In re Estate of A. F. T. Cooper, Laramie, Wyoming

Year, 1920; Deficiency in tax, $7,297.16

Reference is made to office letter dated August 5, 1925, in which you were advised of a deficiency in tax for the year 1920 amounting to $17,601.15.

[fol. 18] You are advised that your protest relative to the adjustments made has been considered and the return for the year 1920 has been reaudited.

The deduction of $20,750.00, the greater portion of which represents a business expense of the estate, has been allowed. This adjustment reduces net income of $98,989.91 to $78,239.91 on which the correct tax liability is $20,139.77 and the additional tax liability $7,057.16.

Relative to your contentions that the estate should be allowed a deduction of $16,870[illegible]0 representing Wyoming Inheritance Tax, you are advised that under IT 1474 the inheritance taxes imposed by the State of Wyoming, are imposed upon the right of the beneficiary to receive property of a decedent and are deductible by the beneficiaries only.

Your protest relative to this contention is, accordingly, denied and the amount of tax paid is being allowed as a deduction to the beneficiaries of the estate.

You are advised that since the taxpayer appears to have been a nonresident alien of Great Britain and Ireland at the time of his death, the exemption of $1,000.00 allowed by the Revenue Agent has been disallowed in accordance with the provisions of Section 216 (e) of the Revenue Act of 1918.

"In the case of a nonresident alien individual who is a citizen or subject of a country which imposes an income tax the credits allowed in Subdivisions C and D shall be allowed only if such country allows a similar credit to citizens of the United States not residing in such country."

Great Britain and Ireland in imposing its income tax fails entirely to satisfy the similar credit requirements of the statute.

You are also advised that in the case of a nonresident alien the normal tax for 1920 is 8%.

The net income and tax liability is determined as follows:

[fol. 19] Net income reported	$61,170.84
Items disallowed:	
Pub. notices	67.52
Probate fees	26.00
Adm'r's Bond Premium	105.55
Wyoming inheritance tax	16,870.00
Net income adjusted	$78,239.91
Less Dividends	257.43
Net income subject to normal tax	$77,982.48
Normal tax at 8%	$6,238.60
Surtax	14,141.17
Total tax liability	$20,379.77
Tax previously assessed	13,082.61
Additional tax liability	$7,297.16

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him."

EXHIBIT 4

Exhibit No. 4 is a letter from N. E. Corthell to M. S. Reynolds, Collector, which reads as follows:

"Mar. 20, 1926.

M. S. Reynolds, Esq., Collector Internal Revenue, Cheyenne, Wyo.

DEAR MR. REYNOLDS: I enclose herewith check to C. B. Collinson, et al., Trustees A. F. T. Cooper Estate for $7,297.16, paying under protest Deficiency Income Tax determined and assessed for 1920, under the name of Cooper,

A. F. T., Estate, N. E. Corthell, Administrator. As I understand this Deficiency is based chiefly on the following grounds:

1. Disallowance of claim of $1,000 personal exemption.

[fol. 20] 2. Disallowance of claim to be assessed on first $4,000 at 4% instead of 8%.

3. Disallowance of deductions claimed for publishing Notices, Probate fees and Administrator's bond premium in connection with the estate.

4. Disallowance of deduction claimed for payment of Wyoming Inheritance Tax $16,870.00.

Each of the foregoing disallowances is conceived to be without authority of law.

Please issue receipt in the name of C. B. Collinson, E. P. Lewis, R. F. Cooper, Trustees A. F. T. Cooper Estate.

Yours truly, —— ——.

NEC—r.
Enc."

EXHIBIT No. 5

Exhibit No. 5 is a letter of N. E. Corthell to M. S. Reynolds, Collector, reading as follows:

1773. "July 27, 1926.

Mr. M. S. Reynolds, Collector Internal Revenue, Cheyenne, Wyo.

DEAR MR. REYNOLDS: I enclose herewith Claim for Refund of Taxes Form 843, A. F. T. Cooper Estate, N. E. Corthell, Administrator, relating to the Deficiency Income Tax of said Estate for the period from Jan. 1st to Dec. 12, 1920.

I also enclose copy of Brief in support of the claim.

Yours truly, —— ——.

NEC—r.
Enc. 2."

[fol. 21] EXHIBIT No. 6

Exhibit No. 6 is an application for refund, of which the following is a copy:

Claim for Refund of Taxes Illegally Collected

STATE OF WYOMING,
County of Albany, ss:

Cooper, A. F. T., Estate; N. E. Corthell, Administrator (Taxpayer); Laramie, Wyoming (Residence).

Same; payment made by C. B. Collinson, E. P. Lewis, R. F. Cooper, Trustees; (Business address:) ——.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period: Year from Jan. 1, 1920, to Dec. 12, 1920

1. Business in which engaged: None.
2. Character of assessment or tax: Deficiency income tax.
3. Amount of assessment or stamps purchased $0
4. Reduction of tax liability requested (inc. & profits tax) 0
5. Amount to be abated 0
6. Amount to be refunded (or such greater amount as is legally refundable) 7,297.16
7. Date of payment (see Collector's receipts or indorsements of canceled checks): March 21, 1926.
8. District in which return (if any) was filed: Cheyenne, Wyoming.
9. District in which unpaid assessment appears: ——
10. Amount of overpayment claimed as credit ....
11. Unpaid assessment against which credit is asked; period from —— to —— 0

Deductions claimed were erroneously disallowed, as follows:

[fol. 22] Publishing notices incident to final settlement $67.52
Probate fees (on Final settlement) 26.00
Adm'r's Bond premium (Aug. 4 to Dec. 12, 1920) 105.55
Wyoming Inheritance tax 16,870.00

$17,069.07

Claim of personal exemption of $1,000.00 was erroneously disallowed.

Normal tax was erroneously computed on first $4,000 @ 8% instead of 4$, estate being treated as non-resident.

The deficiency income tax of $7,297.16 was erroneously assessed upon the foregoing basis.

(Signed) N. E. Corthell, Former Admr., Laramie, Wyo.

Sworn to and subscribed before me this — day of ——, 19—. —— ——."

Exhibit No. 7 is a brief accompanying the application for refund, and supporting the same, amplifying the grounds of the application and discussing the points of law supposed to be involved.

EXHIBIT No. 8, PAGE 1

Exhibit No. 8 is a letter from the commissioner, reading as follows:

"IT:C:PrA. ELA.

Washington, May 18, 1929.

Mr. M. E. Cothell, Administrator of the Estate of A. F. T. Cooper, Laramie, Wyoming.

SIR: Reference is made to the recent conference held in this office in regard to the income tax liability of the Estate of A. F. T. Cooper for the year 1920.

[fol. 23] You are advised that inheritance taxes paid to the State of Wyoming in the amount of $16,870.00 has been allowed as a deduction for the year 1920 in accordance with the provisions of Section 703.

You are informed, however, that administrative expenses of $20,750.00 are not allowable deductions from the income of the estate, these deductions being allowable only against the corpus of the estate. Action of the Commissioner in disallowing administrative expenses has been upheld by the United States Board of Tax Appeals in the decision in

the case of the Estate of James W. Cannon, Sr., Docket Number 1842. The correct computation of the tax follows:

Net income, revenue agent's report		$98,989.91
Less Inheritance taxes paid to the State of Wyoming		16,870.00
Amount subject to surtax		$82,119.91
Less:		
Liberty bond interest	$257.43	
Personal exemption	1,000.00	
		1,257.43
Amount subject to normal tax		$80,862.48
Amount subject to normal tax at 4%		4,000.00
Amount subject to normal tax at 8%		76,862.48
Normal tax at 4%		160.00
Normal tax at 8%		6,149.00
Surtax		15,637.96
Total tax		$21,946.96
Tax assessed on return	$13,082.01	
Additional assessment	7,297.16	
Total tax assessed		20,379.77
Addition		$1,567.19

Since the correct computation results in an additional tax as indicated above which is barred from assessment by the [fol. 24] Statute of Limitations your claim will be rejected on the next schedule to be approved by the Commissioner.

Respectfully, C. B. Allen, Deputy Commissioner, by Charles P. Suman, Head of Division."

Exhibit 9

Exhibit No. 9 is a letter from the commissioner, reading as follows:

"IT:C:PrA. OMS.

Washington, Sep. 4, 1929.

Mr. N. E. Corthell, Administrator Estate of A. F. T. Cooper, Laramie, Wyoming.

SIR: Further reference is made to a letter from Mr. A. W. McCollough, dated July 18, 1929, to a conference held in this office May 8, 1929, and to office letter dated May 18, 1929, relative to a claim for refund of $7,297.16, filed for the year 1920.

The claim is based on the contention that the estate was erroneously treated as a nonresident alien and that deductions as following were erroneously disallowed:

Publishing notices (Incident to final settlement)	$67.52
Probate fees (on final settlement)	26.00
Administration bond premium (August 4 to December 12, 1920)	105.55
Wyoming inheritance taxes	16,870.00
Total	$17,069.07

The Wyoming inheritance taxes of $16,870.00 have been allowed as a deduction and the tax has been computed under the provisions of Sections 210 and 211 applicable to a resident. See office letter dated May 16, 1929. The claim was rejected, however, for the reason that a reexamination of the case indicates a tax liability in excess of the amount assessed.

[fol. 25] You are advised that in determining whether there has been an overpayment of taxes for any year, it is necessary to consider all items on the return, whether or not these items are mentioned in the claim for refund. The deduction of $20,750.00, listed on the return as attorney's fees, appears to represent a capital item chargeable against the corpus of the estate. The item is explained in your protest dated August 27, 1925, as payments made as a result of an agreement between the trustees and attorneys covering a considerable variety of services rendered from the date of death of A. F. T. Cooper in 1918 to the end of the year 1920. You also state that no occasion arose to apportion the payments between probate expenses and other ex-

penses connected with the estate and that no attempt was made to do so.

Inasmuch as there is no evidence on file as to the portion of the $20,750.00 which represents charges for services incident to the operation of the business of the estate and as to the amount representing administration expenses, this office is unable to determine whether any part of the item is allowable as a deduction from income. The entire amount has, therefore, been disallowed.

A reaudit of the return indicates a net income as follows:

Net income reported on return		$61,170.84
Plus unallowable deductions:		
Publishing notices	$67.52	
Probate fees	26.00	
Administration bond premium	105.55	
Attorney's fees	20,750.00	
		20,949.07
Net income adjusted		$82,119.91

The total tax on $82,119.91, after deducting personal exemption credit of $1,000.00 plus $257.43 Liberty Bond interest and computing normal tax at 4% on the first $4,000.00 of net income, is $21,946.96. Since a tax of only $20,379.77 has been paid, it appears that there has been no overpayment of tax for the year 1920. The action of this office in rejecting your claim for refund appears to be correct.

Relative to the refund payments made to the heirs of the estate of A. F. T. Cooper, you are advised that the individual returns were adjusted on the basis of the allowance of [fol. 26] the Wyoming inheritance taxes of $16,870.00 to the beneficiaries. The amounts of overassessments were either refunded or credited against outstanding taxes for other years in May or June of the year 1926.

Respectfully, David Burnet, Deputy Commissioner,
by Charles P. Samson, Head of Division."

EXHIBIT No. 10, PAGE 1

Exhibit No. 10 is a copy of the original return of the taxpayer, which is as follows:

Individual Income-tax Return for Period Begun Jan. 1, 1920, and Ended Dec. 12, 1920

N. E. Corthell, Admr. A. F. T. Cooper Estate, Laramie, Wyoming

1. Are you a citizen of the United States? Yes.

* * * * * * *

4. Did you file a return for 1919? Yes.

5. If so, what address did you give on that return? As above.

6. To what Collector's office was it sent? Wyo.

7. Did you receive any adjustments during the taxable period on account of Government contracts through the operations of a claims board or otherwise? No.

* * * * * * *

12. Write "R" if you kept no books, or books on a cash basis; or "A" if you kept books on an accrual basis. A.

13. Did you pay during the calendar year 1920 to any individual rent, wages, salaries, or other fixed or determinable income amounting to $1,000.00 or over? Yes.

* * * * * * *

16. Enter on line (a) in the table below Interest on Liberty Bonds and other obligations of the United States issued since September 1, 1917, and War Finance Corpo- [fol. 27] ration Bonds, received by you during the taxable period, including interest received through partnerships, personal service corporations, and fiduciaries.

4¼%. Other Obligations issued since September 1, 1917.

* * * * * * *

Treas. Cert's

(c) Exemptions $20,000.00

* * * * * * *

(j) Principal in excess of exemptions	15,000.00
(k) Taxable interest	257.43
(l) Total taxation interest on all obligations as computed above on line (k)	$257.43

Computation of Tax

17.	Net income on which tax is to be computed		$61,170.84
19.	Less:		
	Taxable interest on Liberty Bonds, etc.	$257.43	
20.	Personal exemption	1,000.00	
21.	(Total)		1,257.43
22.	Balance subject to normal tax	$59,913.41	
23.	Amount subject to normal tax at 4%	4,000.00	
24.	Balance subject to normal tax at 8%	$55,913.41	
25.	Normal tax at 4% on amount of Item 23		$160.00
26.	Normal tax at 8% on amount of Item 24		4,473.07
27.	Surtax on Item 17		8,449.54
28.	Total Tax		$13,082.61

[fol. 28]

Schedule E

Income from Rents and Royalties

1. Kind of Property: Oil & Gas.	
2. Name and address of Tenant, Lessee, etc.: Ohio Oil Co., Findlay, Ohio.	
3. Amt. Rec'd	$293,282.61
4. Repairs, Wear and Tear, Obsolescence, Depletion & property losses	81,710.53
6. Taxes	126,458.79
7. Other Expenses	25,553.09

Net Income from Rents & Royalties (total of column 3 minus total of columns 4, 6 & 7) . . . 59,560.20

* * * * * * *

Schedule G

Other Income (not Including Dividends or Interest on Obligations of the U. S.)

* * * * * * *

3. Interest on bank deposits, mortgages, etc. . . . 1,353.21

* * * * * * *

Schedule I

Taxable Interest on Liberty Bonds, Other Obligations of the U. S., and War Finance corporation bonds 257.43

Schedule J

Total net income from above sources $61,170.84

* * * * * * *

Schedule N

Net Income upon which tax is to be computed . $61,170.84

1. Refer to "A", "E", or "K". E 4.
2. Kind of property: Oil & Gas.
3. Date acquired: 1918.
5. Cost, or if acquired prior to Mar. 1, 1913, the fair market value on that date: $1,200,800.00.
6. Repairs, ordinary & incidental: $——.
7. Rate: .101 145 per bbl.
8. Amt. previous years: $12,611.93.
9. Amt. this year: $81,710.53.

[fol. 29] Explanation of Deductions

E7. Att'y's ffes, $20,750. Expenses of Trustees, $3,730.02. Tools, $119. Geological investigations, $750. Publishing notices, $67.52. Probate fees, $26.00. Clerical service, $5.00. Administrator's bond premium, $105.55.

And the foregoing was all of the evidence given or offered on the trial of said cause.

MOTION FOR STATEMENT OF CONCLUSION OF LAW

Thereafter, and before entry of the judgment in said cause, the plaintiffs filed and presented to the court a motion for statement of conclusion of law entitled in said cause, and expressed in the words and figures following, to-wit:

"The plaintiffs move the court to state and declare as a conclusion of law upon the admissions, the evidence and the facts found in the above-entitled cause, as follows:

"The action of the Commissioner of Internal Revenue on May 18, 1929, in revising and redetermining the income tax, assessment and liability of the Estate of A. F. T. Cooper, deceased, for the year 1920, and his action on September 4, 1929, in reaffirming such determination, were, in each instance, void and beyond the jurisdiction and power of the said Commissioner, being had and taken after the period for the assessment of such income tax liability had expired."

And upon due consideration of the said motion, the court thereafter, on the 29th day of August, 1930, denied the same, to which ruling of the court the plaintiffs excepted.

Thereupon the court made and filed its findings of fact and conclusions of law in said cause, in the words and figures following, to-wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly to be tried before the Court without a jury, due waiver of a jury in writing having been filed herein, and the parties appearing by their respective [fol. 30] counsel, and the Court having heard and considered the evidence and argument of counsel and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I. That Arthur Francis Thomas Cooper died on or about December 8, 1918, and N. E. Corthell was appointed and duly qualified and acted as administrator of the estate of the decedent. That on or about February 8, 1921, the said

administrator on behalf of said estate filed with the Commissioner of Internal Revenue a federal income tax return for the said estate for the taxable period starting January 1st, and ending December 12, 1920. That final settlement of the said estate was made on December 12, 1920, and at that time the said estate was distributed to the trustees under the Will of the said decedent and the administrator discharged and the estate closed.

II. That the trustees under the Will of Arthur Francis Thomas Cooper, deceased, to whom such distribution was made, were Christopher Barbour Collinson, Edgar Percy Lewis; and Richard F. Cooper, the plaintiffs herein.

III. That Marshall S. Reynolds is the United States Collector of Internal Revenue for the District of Wyoming and the tax here in controversy was paid to him as such official.

IV. That the income tax return for the said estate filed as hereinabove set out showed a tax liability of $13,082.61, which sum was paid. In determining this tax, deductions from gross income of the estate for attorney's fees, in the sum of $20,750.00 and for Wyoming inheritance tax in the sum of $16,870.00, which sums had been paid by the administrator, were claimed.

V. In March, 1923, an Internal Revenue Agent, after an investigation of the said estate, recommended the disallowance of both of these claimed deductions. In August, 1925, the commissioner notified the taxpayer of the deficiency in tax amounting to $17,601.15, based upon the report of the said Revenue Agent, following which the taxpayer filed a protest. Upon consideration of the matter as presented by the protest, and in November, 1925, the said Commissioner [fol. 31] made a redetermination of the tax and found that the greater portion of the deduction of $20,750.00 represented a business expense of the estate, and allowed that sum as a deduction, but adhered to his disallowance for the Wyoming State Inheritance Tax in the sum of $16,870.00, holding that such payment, although made by the administrator, was deductible only by the beneficiaries of the estate, and determined the additional tax liability on this basis to be $7,297.16, which amount was paid by the plaintiffs on March 20, 1926. On July 29, 1926, the taxpayer filed a claim for refund of such additional tax.

VI. On May 18, 1929, the Commissioner of Internal Revenue rejected the claim for refund filed on July 29, 1926, as above set out, and so notified the representatives of the estate, and at the same time further advised the administrator of the estate that the amount of the inheritance tax paid to the State of Wyoming was allowed as a deduction from gross income for the year 1920 in accordance with Section 703 of the Revenue Act of 1928, that the personal exemption of $1,000.00 was allowed and that the normal tax on the first $4,000.00 of taxable income was computed at 4% instead of at 8%; that the attorney's fees in the sum of $20,750.00 which had been claimed as a deduction in the return was disallowed, that the correct computation of the tax resulting from the foregoing adjustments resulted in an increase in the additional tax, that is, in excess of the sum of $7,297.16, in the amount of $1,567.19, but that the collection of this excess was barred by the Statute of limitations and no attempt to collect it was made.

VII. Thereafter this suit was filed by the trustees. The other small items included in the protest of payment were waived upon the trial and the matter was presented to the court solely upon the action of the Commissioner as it affects and concerns the claimed deductions for attorney's fees and Wyoming inheritance tax.

Conclusions of Law

I. The income tax collected by the defendant from the estate of Arthur Francis Thomas Cooper, deceased, for the year 1920 is correct and in accordance with law.

II. The defendant is entitled to judgment for his costs and disbursements herein.

[fol. 32] To each of which Conclusions of Law the plaintiffs except.

T. Blake Kennedy, Judge."

IN UNITED STATES DISTRICT COURT

APPROVAL OF BILL OF EXCEPTIONS

And, thereafter, to-wit, on the 29th day of August, 1930, the plaintiffs duly tendered and submitted to the court this,

their Bill of Exceptions in said cause, which having been examined by the court, and it being found that the exceptions are herein truly agreed, the said Bill of Exceptions is now here allowed as a part of the record in said cause.

Dated August 29th, 1930.

T. Blake Kennedy, Judge."

IN UNITED STATES DISTRICT COURT

STIPULATION RE BILL OF EXCEPTIONS

It is hereby stipulated on the part of the plaintiffs and the defendant in the above cause that the foregoing Bill of Exceptions is a full, true and correct statement of the proceedings in the trial and disposition of said cause, and the exceptions of the plaintiffs had and taken in such proceedings.

Dated August 29th, 1930.

N. E. Corthell, Attorney for Plaintiffs. Albert D. Walton, United States Attorney for District of Wyoming; John R. Wheeler, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Aug. 29, 1930

To Hon. T. Blake Kennedy, judge of said court:

The above-named plaintiffs feeling themselves aggrieved by the order and judgment made and entered in this cause on the — day of August, 1930, do hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Tenth Circuit for the reasons specified in the as- [fol. 33] signment of errors filed herewith, and pray that their said appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which such order and judgment are based, duly authenticated, may be sent to the United

States Circuit Court of Appeals for the Tenth Circuit sitting at Denver, Colorado; and that such further order may be made as to the bond on appeal, to be filed and approved in order to perfect said appeal, as shall to the court seem proper.

Dated this 29 day of Aug., 1930.

N. E. Corthell, Attorney for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Aug. 29, 1930

Upon reading and filing the petition for appeal on the part of the plaintiffs above named, and an assignment of errors having been presented and filed:

It is ordered that the appeal be allowed in the above-named cause to the Circuit Court of Appeals for the Tenth Circuit, and that the bond to be filed therewith is fixed in the sum of Five Hundred Dollars.

Dated this 29 day of Aug., A. D. 1930.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Aug. 29, 1930

Come Now Edgar Percy Lewis and Richard F. Cooper, plaintiffs above-named, and appellants in the above-entitled cause, and in connection with their petition for appeal in this cause, assign the following errors which the said appellants aver occurred at the trial thereof, and upon which they rely to reverse the judgment entered herein as appears of record:

1. The court erred in denying the motion of the plaintiffs to state and declare as a conclusion of law upon the admissions, the evidence and the facts found, as follows:

[fol. 34] "The action of the Commissioner of Internal Revenue on May 18, 1929, in revising and redetermining the income tax, assessment and liability of the Estate of A. F. T. Cooper, deceased, for the year 1920, and his action on September 4, 1929, in reaffirming such determination, were, in each instance, void and beyond the jurisdiction and power of the said Commissioner, being had and taken after the period for the assessment of such income tax liability had expired."

The admissions, the undisputed evidence and the findings of the court were in effect that the taxpayer's return was filed February 8, 1921, and the indicated tax duly paid; that on November 24, 1925, the Commissioner determined and assessed the deficiency tax, which was duly paid and is here sought to be recovered; that application for refund thereof was duly filed, and that in rejecting such application the Commissioner, on May 18, 1929, attempted to revise and change his previous findings of fact and to redetermine the tax. Without such change and redetermination the application for refund was conceded by the Commissioner to be well founded for substantially the whole amount sought to be recovered. It was the contention of the plaintiffs that such revision and change of assessment, attempted more than five years after the return was filed, was void.

2. The Court erred in its first conclusion of law in holding that the income tax collected by the defendant for the year 1920 is correct and in accordance with law. This assignment is based upon substantially the same grounds as are set forth in assignment No. 1.

3. The Court erred in its second conclusion of law that the defendant is entitled to judgment for his costs and disbursements herein. This assignment, also, is based upon substantially the same grounds as are set forth in assignment No. 1. It was the contention of the plaintiffs that they were entitled to judgment against the defendant for the recovery of so much of the deficiency tax of Seventy-two

Hundred Ninety-seven and 16/100 ($7297.16) Dollars, as was based upon the disallowance of the claimed deduction of Sixteen Thousand and Eight Hundred Seventy ($16,870.00) Dollars, Wyoming State Inheritance Tax paid, the disallowance of the personal exemption of One Thousand ($1,000.00) Dollars claimed and the computation of the [fol. 35] normal tax on the first Four Thousand ($4,000.00) Dollars of taxable income at four (4%) per cent instead of at eight (8%) per cent.

4. The Court erred in giving judgment for the defendant and against the plaintiffs. It was the contention of the plaintiffs that they were entitled to a judgment against the defendant for the recovery of the sum indicated in assignment No. 3 above, together with interest thereon from March 20th, 1926, at the rate of six (6%) per cent per annum, and the cost of the action.

Wherefore the appellants pray that the judgment of the said District Court may be reversed, and that the appellants recover from the defendant, as set forth in this assignment of errors.

N. E. Corthell, Attorney for Appellants.

[File endorsement omitted.]

(Citation in proper form, directed to appellee, was issued on Aug. 29, 1930, and on the same day service of said citation was accepted by counsel for said appellee.)

IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING TRANSCRIPT—Filed Sept. 25, 1930

Come now the above named plaintiffs and appellants and hereby elect to have the printing of the transcript on appeal in the above entitled case done under the supervision and direction of the Clerk of the United States Circuit Court of Appeals for the Tenth Judicial Circuit.

Dated this 25th day of September, A. D. 1930.

N. E. Corthell, Attorneys for Plaintiffs.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION FOR TRANSCRIPT—Filed Sept. 25, 1930

It is hereby stipulated and agreed between the parties in the above-entitled cause that the following portions of the record shall be included in the transcript, to-wit:

[fol. 36] 1. The plaintiffs' petition.
2. The defendant's answer. (Filed Feb. 5, 1930.)
3. The order suggesting death of Christopher Barbour Collinson.
4. The order denying motion for statement and declaration of conclusion of law.
5. Findings of Fact and Conclusions of Law and Judgment.
6. The Judge's memorandum.
7. The Bill of Exceptions.
8. The petition for appeal.
9. The order allowing appeal.
10. The assignment of errors.
11. The citation on appeal.
12. Election as to printing.
13. This stipulation.
14. Bond on Appeal.

N. E. Corthell, Attorneys for Plaintiffs. Albert D. Walton, United States Attorney for the District of Wyoming; John R. Wheeler, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

[File endorsement omitted.]

(Bond on appeal in the sum of $500, approved by the District Judge, with appellants as principals and C. D. Spalding and R. G. Fitch as sureties, was filed in the District Court on Aug. 29, 1930.)

[fol. 37] IN UNITED STATES DISTRICT COURT

Corthell, McCullough and Corthell, of Laramie, Wyo., for Plaintiff.

Albert D. Walton, U. S. Attorney, of Cheyenne, Wyo., C. M. Charest, General Counsel, and John R. Wheeler and P.

E. Miller, Special Attorneys of Internal Revenue Bureau, of Washington, D. C., for Defendant.

JUDGE'S MEMORANDUM—Decided July 23, 1930

KENNEDY, District Judge:

This is an action at law in which plaintiffs seek to recover of the defendant Collector, a certain sum paid as income taxes under protest, upon the ground that said taxes were improperly and illegally assessed. The Collector resists the suit by appropriate pleadings and the matter is presented to the court, a trial by jury having been expressly waived.

Arthur Francis Thomas Cooper having died, the administrator of the estate made an income tax return for the year 1920 in which deductions of two items were claimed, (1) attorney's fees expended of $20,750.00 and (2) Wyoming inheritance tax paid of $16,870.00, from which computation there resulted a tax of $13,082.61, which was subsequently paid in March, 1921. In March, 1923, a Revenue agent recommended the disallowance of both claimed deductions. In August, 1925, the Commissioner of Internal Revenue notified the taxpayer of a deficiency in tax amounting to $17,000.00 plus, based upon the report of the agent, following which the taxpayer filed a protest. In November, 1925 the Commissioner made a re-determination of the tax by which item No. one hereinbefore referred to relating to attorney's fees was allowed as a deduction, and item No. two relating to the Wyoming inheritance tax was disallowed and the tax thereupon recomputed and assessed by which an additional tax liability of $7,297.16 was levied. In March, 1926 the taxpayer transmitted and paid under protest such additional tax. In July, 1926, the taxpayer filed application for a refund of such additional tax. In May, 1929, the Commissioner notified the taxpayer of his decision resulting in a refusal to refund and setting forth a recomputation of the tax. In his latest computation the Commissioner allowed the deduction of item No. two, the [fol. 38] Wyoming inheritance tax paid, but disallowed item No. one, the attorney's fees expended which had theretofore been allowed, resulting in an indicated additional tax of $1,500.00 plus, which additional tax the Commissioner ruled was barred by the Statute of Limitations, but refusing any

refund of the taxes so paid under protest. Other small items included in the protested payment were waived upon the trial and the matter is presented to the court solely upon the action of the Commissioner as it affects and concerns the two items which are hereinbefore referred to.

It is the contention of the plaintiffs, as the court understands it, that the Commissioner once having allowed the deduction in making the assessment of the item concerning attorney's fees, is barred from subsequently disallowing said deduction because of the time which elapsed and that such action by the Commissioner in allowing such reduction became final. On the other hand, the defendant contends that so long as the matter of the adjustment of the tax was before the Commissioner, that official had the right and the authority to modify and change the assessment schedules so long as the matter of the particular tax for which the application for refund had been made was before him and remained unadjusted.

The courts have not been entirely in harmony upon the exact point here presented. Without entering into a lengthy discussion of these decisions, the latest case cited by counsel for defendant is one from the Third Circuit, McIlhenny, et al. v. Commissioner, 39 Fed. (2d) 356, where the following set-up of facts is presented:

"John D. McIlhenny filed an income tax return for the year 1920, in which he claimed a deduction for loss of $4,749.42. Early in 1923, a revenue agent examined his return and disallowed the deduction. McIlhenny filed a protest. In February of 1924 the Commissioner of Internal Revenue, after giving consideration to the report of the revenue agent and the taxpayer's protest, expressly allowed the deduction in full. Other adjustments in the return, however, resulted in a determination of a deficiency and an assessment of an additional tax which McIlhenny duly paid in full. On November 18, 1925, the same Commissioner, without having before him any evidence of fraud, mal- [fol. 39] feasance, misrepresentation of fact, or new evidence of any character, reopened the case, disallowed the deduction and, on January 8, 1926, notwithstanding the protest of the executors of McIlhenny, who had died on November 23, 1925, determined, solely because of such disallowance, a deficiency in his income tax for 1920 in the sum of $2,043.82. The executors appealed from the redetermina-

tion of the Commissioner to the United States Board of Tax Appeals. The Board sustained the Commissioner."

The court then analyses the question presented in the following language:

"But the sole question presented by the record before us is not whether the first action of the Commissioner in allowing the deduction was right or wrong, but whether having once determined the matter, the tax computed upon such determination having been paid, the Commissioner had power or authority, in the absence of fraud or other new evidence, to reopen the case, disallow the deduction theretofore allowed by him, and make a redetermination of the tax. In support of their contention that the Commissioner was without power to reopen the case and make a redetermination, the petitioners, the taxpayer's executors, rely upon Woodworth v. Kales, 26 F. (2d) 178 (C. C. A. 9), and the Commissioner's order of January 20, 1923, while the Commissioner finds support for his opposite view in Botany Mills v. United States, 278 U. S. 282, 49 S. Ct. 129, 73 L. Ed. 379; L. Loewy & Son v. Commissioner of Internal Revenue, 31 F. (2d) 652 (C. C. A. 2); Holmquist v. Blair, 35 F. (2d) 10 (C. C. A. 8); Austin Co. v. Commissioner of Internal Revenue, 35 F. (2d) 910 (C. C. A. 6); sections 1312 and 1313 of the Revenue Act of 1921, 42 Stat. 227; and sections 1006 and 1007 of the Revenue Act of 1924, 43 Stat. 253 (26 U. S. C. A., Pars. 1249 note, 1250)."

The court thereupon expresses its conclusion at page 358, as follows:

"In the case at bar, the statutory procedure was not followed, in that there was no agreement in writing, or otherwise, that the determination and assessment of February, 1924, should be final and conclusive. As a consequence, we [fol. 40] are constrained to hold that the determination and assessment of 1924 were not final and conclusive, and that the Commissioner was not estopped or otherwise barred, by the payment and acceptance of the tax based on such determination and assessment, for reopening the case and making the further determination subsequently made by him."

If the state of the law is as determined in that case, I see no reason why on principle it should not be applied to the case at bar. In addition, it might be said that the plaintiffs after the redetermination still had the right to contest the validity of the disallowance of the attorney's fees and to have the matter of the proper or improper disallowance of this item passed upon in the regular course. This action, however, the plaintiffs have not elected to pursue. While it is the law that where doubt arises in regard to the construction of the tax, the doubt must be resolved in favor of those upon whom the tax is sought to be laid (Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397), yet it is likewise the law that in a suit to recover alleged illegal taxes collected, the burden of proving the illegality rests upon the taxpayer (Botany Worsted Mills v. United States, 278 U. S. 282); and in the strict application of the latter principle as concerns the item of attorney's fees, the burden placed upon the taxpayer has not been discharged by plaintiff's showing in this case.

It may be admitted that the situation which has here arisen makes for a condition of confusion and uncertainty to the taxpayer which the Congress might in all fairness make plain; however, it is doubtful whether a fair construction of the statutory provisions covering income tax assessments affords any relief at the present time.

For the reasons stated, the findings and judgment will be for the defendant together with costs, and reserving to plaintiffs their proper exceptions.

[fols. 41 & 42] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 43] Appearances of counsel omitted in printing.

Order of submission, January 21, 1931, omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, JANUARY TERM, 1931

No. 369

Mr. N. E. Corthell (Mr. A. W. McCullough and Mr. M. E. Corthell were with him on the brief) for appellants.

John R. Wheeler, Special Attorney, Bureau of Internal Revenue (C. M. Charest, General Counsel, and P. E. Miller, Special Attorney, Bureau of Internal Revenue, and A. D. Walton, U. S. Attorney, were with him on the brief) for appellee.

Before Cotteral, Phillips, and McDermott, Circuit Judges

OPINION—March 17, 1931

PHILLIPS, Circuit Judge, delivered the opinion of the court:

This is an action at law brought by Edgar Percy Lewis and Richard F. Cooper, as trustees under the will of Arthur Francis Thomas Cooper, deceased, to recover $7,297.16 alleged to have been wrongfully collected as federal income tax assessed against the estate of Cooper for 1920.

On February 18, 1921, the administrator of such estate filed an income tax return for the period from January 1 to December 12, 1920—a final settlement of the estate having been made on the latter date. In such return, deductions were claimed on account of the following expenditures made by the administrator: Attorney's fees, $20,750; state inheritance tax, $16,870; publishing notices, $67.52; probate court fees, $26.00; and premium on administrator's bond, $105.55. A personal exemption of one thousand dollars was claimed and the normal tax on the first four thousand dollars was computed at four per cent.

On November 24, 1925, the commissioner determined the tax upon such return. He disallowed all of such deductions except the item of attorney's fees. He determined that Cooper, deceased, was a non-resident alien of Great Britain and Ireland at the time of his death and, there-

fore, disallowed the exemption of one thousand dollars and computed the tax on the first four thousand dollars at eight per cent. He assessed a deficiency tax of $7,297.16. On March 21, 1926, the trustees paid such deficiency assessment under protest.

On July 27, 1926, the trustees filed a claim for refund of $7,297.16, based on the disallowance of such deductions [fol. 45] and exemption and the computation of the normal tax at eight per cent instead of four per cent.

A letter from the commissioner to the trustees, dated May 18, 1929, stated that the payment of $20,750 for attorney's fees was not allowable as a deduction from income, and set forth a corrected computation of the tax. In such computation, the commissioner allowed the amount paid as inheritance tax as a deduction, allowed the personal exemption of one thousand dollars and computed the normal tax at four per cent. Such computation showed a total tax liability of $21,946.96, and the tax theretofore assessed and paid as $20,379.77. Such letter further stated:

"Since the correct computation results in an additional tax as indicated above which is barred from assessment by the statute of limitations your claim will be rejected on the next schedule to be approved by the commissioner."

The trial court held that the claim for refund was properly denied and entered a judgment accordingly. The trustees have appealed.

Counsel for the trustees contend that the commissioner was without authority to redetermine and reassess the tax after the statute of limitations had run against the assessment, and that he was restricted in his consideration of the claim for refund, at the time of his decision, to a determination of whether the trustees were entitled to deductions of the specific items set up in the claim for refund.

Counsel for the collector contend that the commissioner had the power, upon consideration of the claim for refund, to reconsider the entire assessment and to determine whether or not the trustees had overpaid the tax.

Section 284 (a) of the Revenue Act of 1926 (44 Stat. 66), Section 1065, Title 26, U. S. C. A., in part provides:

"(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act (Feb. 26, 1926), the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and [fol. 46] for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of each excess shall be refunded immediately to the taxpayer."

Section 322 (a) and (b) of the Revenue Act of 1928 (45 Stat. 861), Section 2322, Title 26, U. S. C. A., in part provides:

"(a) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

"(b) Limitation on Allowance.—(1) Period of limitation. No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax.

The action to recover on a claim for refund is in the nature of an action for money had and received, and it is

incumbent upon the claimant to show that the United States has money which belongs to him. Champ Spring Co. v. United States (C. C. A. 8), — Fed. (2d) —.

Since, in the instant case, the trustees had not overpaid the tax, the claim for refund was properly denied.

Judgment affirmed.

[fols. 47 & 48] In United States Circuit Court of Appeals

Judgment—March 19, 1931

Before Honorable Robert E. Lewis and Honorable George T. McDermott, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Wyoming, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause, be and the same is hereby affirmed, and that Marshall S. Reynolds, Individually and as Collector of Internal Revenue, appellee, have and recover of and from Edgar Percy Lewis and Richard F. Cooper, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, appellants, his costs herein.

[fols. 49-54] Petition for rehearing, covering five pages, filed April 18, 1931, omitted from this print. It was denied and nothing more by order of April 20, 1931.

[fol. 55] In United States Circuit Court of Appeals

Order Denying Rehearing—April 20, 1931

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR SUSPENSION OF MANDATE—Filed April 27, 1931

The appellants move the court to direct the clerk to suspend the issuance of a mandate to the District Court in the above entitled cause to afford an opportunity for application which the appellants propose to make to the Supreme Court for the Writ of Certiorari.

N. E. Corthell, Attorney for Appellants.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—April 27, 1931

This cause came on to be heard on the motion of appellants for a stay of mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 56] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,927. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 115. Edgar Percy Lewis and Richard F. Cooper, as trustees under the will of Arthur Francis Thomas Cooper, deceased, petitioners, vs. Marshall S. Reynolds, individually and as Collector of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed May 27, 1931. File No. 35,927.

No. [illegible]

Petition for Certiorari

FILE COPY

MAY 27
[illegible]

Brief for Petitioners

IN THE

Supreme Court of the United States

October Term, 1930

EDGAR PERCY LEWIS and RICHARD F. COOPER, as Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, PETITIONERS,

vs.

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, RESPONDENT.

ON PETITION FOR CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

N. E. CORTHELL,
Attorney for Petitioners.

Petition for Certiorari

Brief for Petitioners

IN THE

Supreme Court of the United States

October Term, 1930

EDGAR PERCY LEWIS and **RICHARD F. COOPER**, as Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, PETITIONERS,

VS.

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, RESPONDENT.

ON PETITION FOR CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS.
TENTH CIRCUIT

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1930

EDGAR PERCY LEWIS and RICHARD F. COOPER, as Trustee Under the Will of Arthur Francis Thomas Cooper, Deceased, PETITIONERS,

vs.

MARSHALL S. REYNOLDS, Individually, and as Collector of Internal Revenue, RESPONDENT.

Petition for Certiorari

To The Honorable, The Supreme Court of the United States:

The petition of Edgar Percy Lewis and Richard F. Cooper, as trustees under the Will of Arthur Francis Thomas Cooper, Deceased, respectfully shows to the Court as follows:

The petitioners seek in this action to recover for overpayment of an additional income tax paid by them to the defendant as Collector of Internal Revenue.

The action was brought in the District Court of the United States for the District of Wyoming, upon which jurisdiction is conferred by Judicial Code, Sec. 24, Par. 5, 44 Stat. 866.

The trial court made special findings upon which judgment was entered August 29, 1930, for the defendant. (R. 6-9)

The case was taken by appeal to the Circuit Court of Appeals for the Tenth Circuit, which court on March 19, 1931 affirmed the judgment. On April 27, 1931 the mandate was stayed for thirty days, conditioned on the filing of petition for certiorari. (R. 47, 55)

Your petitioners are advised that the Circuit Court of Appeals was in error in affirming the judgment, and should have reversed the judgment of the trial court and directed judgment for the petitioners upon the findings made by the trial court.

The tax return for 1920 was filed February 18, 1921, additional tax determined November 24, 1925, payment made March 21, 1926, application for refund filed July 27, 1926, and rejected May 18, 1929. (R. 6-8).

In rejecting the application the Commissioner conceded substantially all of the claims made and based the rejection on a reversal of his finding upon an item of deduction which had been allowed in the assessment. (R. 7-8).

The decision of the Circuit Court of Appeals involved the following questions, all of which were determined against the petitioners:

1. The court decided explicitly that upon the application for refund the Commissioner had the power to redetermine the tax; and that the burden was on the tax payers to prove that the redetermination was wrong. (R.46.) This decision, by necessary implication, upon the facts found, gave effect to the redetermination as transforming, reconstructing and increasing the tax originally assessed, thus substituting a new and different basis for the plaintiffs' cause of action.

The decision is believed to be entirely novel. It is applicable to all tax recovery cases. It involves among other consequences:

2. Disregard of the five year statute of limitations upon the determination and assessment of a tax. (Rev. Act of 1926, Sec. 277 (a) (3), 44 Stat. part 2, p. 58.).

3. Disregard of the statute prescribing due process in the form of notice of the proposed assessment. (Rev. Act. of 1926, Sec. 283 (a), 44 part 2, p. Stat. 63).

4. Depriving the tax payer of the statutory remedy of appeal from the Commissioner to the Board of Tax Appeals. (Rev. Act. of 1926, Sec. 274 (f), 44 Stat. part 2, p. 56.).

5. Transposing the burden of proof from the party attacking to the party relying upon the findings made in the assessment. (R. 46, Gen. Lead Batteries Co. vs. Com. 2 B. T. A. 392, 395.)

6. Adding further divergence and confusion to the inter-circuit conflict of authority concerning the power to redetermine a tax, exemplified in Woodworth vs. Kales (CCA6) 26 F. (2d) 178, 180-183; Loewy vs. Com. (CCA2) 31 F. (2d) 652; Holmquist vs. Blair (CCA8) 35 F. (2d) 10; and McIlhenny vs. Com. (CCA3) 39 F. (2d) 356.

Your petitioners therefore are advised and show that the Circuit Court of Appeals in holding that the Commissioner, upon the application for a refund, had power to redetermine the tax, giving such redetermination the effect of a reassessment, has decided an important question of Federal law which has not been but should be settled by this court; that in deciding that such redetermination could be made after the expiration of the five year Statute of Limitations, it has decided a Federal question in a way probably in conflict with the applicable decisions of this court; that in giving such effect to the redetermination of the Commissioner, in the absence of notice to the tax payers, it has decided a further Federal question in a way probably in conflict with the applicable decisions of this court in relation to due process; that in transposing the burden of proof from the Commissioner to the tax payer, in respect to the Commissioner's finding in the original assessment of the tax, it has decided an important question of general law in a way probably untenable and in conflict with the weight of authority; that in sustaining the authority of the Commissioner, in the absence of fraud and without additional evidence, to redetermine the tax, it has increased the divergence and conflict already existing between the decisions of several of the Circuit Courts of Appeals on the same matter.

Your petitioners herewith as a part of this petition present a complete transcript of the record and proceedings in the Circuit Court of Appeals.

Your petitioners pray that an order may be made to review the decision of the Circuit Court of Appelas in this cause and that the certified transcript of record herewith presented be

treated as though sent up in response to a formal writ; that this court reverse or modify the decision and judgment of the Circuit Court of Appeals and direct that Court to enter a judgment reversing the judgment of the District Court and directing a judgment to be entered in favor of the petitioners and against the defendant; and that your petitioners may have such other and further relief in the premises as to this Court may seem fit.

EDGAR PERCY LEWIS and RICHARD F. COOPER, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased,
Petitioners.

By: N. E. CORTHELL,
Their Attorney. Laramie, Wyoming

State of Wyoming, }
County of Albany. } ss.

Nellis E. Corthell, being duly sworn says that he is counsel for Edgar Percy Lewis and Richard F. Cooper, Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, Petitioners; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

N. E. CORTHELL.

Subscribed and sworn to before me this 23rd day of May, 1931.

A. W. McCOLLOUGH,
Notary Public.

INDEX

		PAGE
I.	STATEMENT OF THE CASE	1
II.	ERRORS RELIED UPON	2
III.	ARGUMENT	4
1.	The Commissioner had no authority, in considering the application for refund, to "redetermine" the tax in the sense of substituting a different assessment for that which had been made.	4
2.	The attempted "redetermination" of the tax was made more than five years after the date of filing the return and was therefore barred.	9
	(Rev. Act. of 1926, Sec. 277 (a) (3), 44 Stat. Part 2, p. 58).	9
3.	The attempted "redetermination" of the tax was made without the notice prescribed by statute.	11
	(Rev. Act of 1926, Sec. 283 (a), 44 Stat. Part 2, p. 63).	11
4.	The circumstances under which the attempted "redetermination" was made deprived the plaintiffs of the statutory remedy of appeal from the assessment to the Board of Tax Appeals.	13
5.	The decision imposed upon the plaintiffs the burden of justifying the finding of the Commissioner in the assessment of the tax and disproving his assertion in rejecting the application for refund, contrary to the established presumption in favor of the former finding.	14
6.	Apart from the five year Statute of Limitations above referred to, the decision extends and increases the inter-circuit confusion of authority on the question of the extent and limitations of the power of the Commissioner to re-examine, redetermine and reassess a tax after the original assessment.	17

PAGE

IV. ACTS OF CONGRESS

Revenue Act of 1918:
Sec. 250 (d) (40 Stat. 1083) 9
Sec. 1301 (d) 40 Stat. 1141) 11

Revenue Act of 1924:
Sec. 274 (a) (43 Stat. 297) 12
Sec. 274 (b) (43 Stat. 297) 12
Sec. 900 (43 Stat. 336) 12

Revenue Act of 1926:
Sec. 274 (a) (44 Stat. Part 2, p. 55) 13
Sec. 277 (a) (3) (44 Stat. Part 2, p. 58) 3, 9
Sec. 283 (a) (44 Stat. Part 2, p. 63) 3, 11, 12, 13

Revenue Act of 1929:
Sec. 607 (45 Stat. 874) 5, 10, 11
Sec. 609 (45 Stat. 875) 5, 10

V. CASES CITED
Austin Co. vs. Com., 35 Fed. (2d) 910 18
Berkshire Cotton Mfg. Co. vs. Com., 5 B. T. A. 1230, 1240, Index 1242. 16
Bonwit Teller & Co. vs. U. S., 51 S. C. Rep., 395 ..... 7, 10, 11
Botany Worsted Mills vs. U. S., 278 U. S. 282, 289 13
Bowers vs. New York & A. L. Co., 273 U. S. 346, 350, 351 10
Boyne City Lumber Co. vs. Doyle, 47 Fed. (2d) 772. ..... 18, 19
Champ. Spring Co. vs. U. S. 47 Fed. (2d) 1 4
Collinson vs. Reynolds, 43 Fed. (2d) 395 1
Crider Bros. Co. vs. Com., 10 B. T. A. 348, 350 16
Farmers' Feed Co. vs. Com., 10 B. T. A. 1069, 1072 16
Fowler vs. Com. 6 B. T. A. 250, 254-255 16
Fox vs. Edwards, 278 Fed. 669, 673 6
French vs. Com., 10 B. T. A. 665, 666 13
Garneau, Joseph, vs. Bowers, 8 Fed. (2d) 378 12
Gen. Lead Batteries Co., vs. Com., 2 B. T. A., 392, 395 16
Cox vs. Delmas, 99 Calif. 104 6
Gould vs. Gould, 245, U. S. 151 16
Guthrie vs. Olson, 44 Minn. 404 6
Henderson Tire and Rubber Co. vs. Com., 12 B. T. A. 716, 720 16
Holmquist vs. Blair, 35 Fed. (2d) 10 ..... 18, 19

PAGE

Hurd vs. Lodge, 20 Pick. 53 6
Lipke vs. Lederer, 259 U. S. 557, 562 11
Loewy vs. Com., 31 Fed. (2d) 652 18
McFetridge vs. Com. 9 B. T. A. 759, 762-763 16
McIlhenny vs. Com. 39 Fed. (2d) 356, 13 B. T. A. 288 ..... 4, 18, 19
Mitchell, Antoinette J., vs. Com. Doc. No. 38023 B. T. A. April 29, 1931 13
Schilling Grain Co. vs. Com. 8 B. T. A., 759, 7627-63 16
Texas and Pacific R. Co. vs. Com. 9 B. T. A. 365 16
U. S. vs. Merriam, 263, U. S. 179, 187 16
U. S. vs. Michel, 51 S. C. Rep. 84 9
U. S. vs. Updike, 281 U. S. 489, 496 9
Western Wholesale Drug Co. vs. U. S., 47 Fed. (2d) 770 ..... 4, 11
Williamsport WireRope Co. vs. U.S. 277 U. S. 551, 562 12
Wolferman vs. Com. 10 B. T. A. 285, 287 16
Woodward vs. Kales, 26 Fed. (2d) 178 ..... 4, 18

VI. MISCELLANEOUS

1 C. J. 979 6
I-1 Cum. Bul. 313 ..... 4, 11

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1930

EDGAR PERCY LEWIS and RICHARD F. COOPER, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, PETITIONERS,

vs.

MARSHALL S. REYNOLDS, Individually and as Collector of Internal Revenue, RESPONDENT

Brief for Petitioners

STATEMENT OF THE CASE

The petition in this case is presented under Judicial Code 240 (a) seeking review of a decision of the Circuit Court of Appeals of the Tenth Circuit, affirming a judgment of the District Court of Wyoming in an action brought by the petitioners as plaintiffs against the defendant as Collector of Internal Revenue to recover for overpayment of an additional tax.

The opinion of the District Court (R. 37-40) is reported as Collinson vs. Reynolds, 43 (2d) 395. The opinion of the Circuit Court of Appeals (R. 44-46) has not yet been published in the Federal Reporter.

The case involves an additional income tax of the A. F. T. Cooper Estate for 1920, the ultimate controversy being confined to a single item of $20,750.00, deduction which the Commissioner had allowed in the assessment but repudiated in rejecting the application for refund. The District Court found in conformity with the petition, the admissions, and the proofs, that the tax return was filed February 8, 1921, and the indicated tax paid; that among the deductions from gross income claimed

were $20,750.00 for attorney's fees and $16,870.00 for Wyoming Inheritance Tax paid by the estate; that, after considering the return, the report of a revenue agent, and the protest of the taxpayer, the Commissioner, in November, 1925, redetermined the tax, found that the greater portion of the item of $20,750.00 represented a business expense of the estate and allowed the same as a deduction; but disallowed the State Inheritance Tax, $16,870.00, holding that it was deductible only by the beneficiaries of the estate. Upon this determination, an additional tax of $7,297.16 was assessed by the Commissioner and was paid by the plaintiff on March 20, 1926. On July 29, 1926 a claim for refund was filed, which was rejected on May 18, 1929. In the notification of rejection the Commissioner advised that the item of $16,870.00 inheritance tax was allowed and certain minor allowances in computing the tax made, but that the item of $20,750.00 attorneys' fees was "disallowed," and that an increase of tax resulted, the collection of which was barred by the statute (R. 6-8). The evidence upon which the findings were based included the Commissioner's letter of November 24, 1925 (R. 17) notifying the assessment in which (R. 18) he found that the item of attorneys' fees was chiefly a "business expense" and allowed it as a deduction; and his letter of May 18, 1929 (R. 22) rejecting the application for refund, in which (R. 23) he called the item an "administration expense"; and the rejection was based upon this ground.

Upon the findings the court gave judgment for the defendant (R. 8). The Circuit Court of Appeals affirmed the judgment (R. 47).

ERRORS RELIED UPON

The case as thus presented and decided by the two courts turns solely on the item of $20,750.00 attorneys' fees claimed by the taxpayers and allowed in the assessment as a deduction from gross income. At no stage of the present suit has there been any contention over any other element of the plaintiff's claim. If the allowance of this item of deduction, made by the Commissioner in the assessment, controls, the plaintiffs are entitled to recover (with minor deductions) the amount claimed in the petition. If, on the other hand, the Commissioner's

"redetermination," in rejecting the application for refund, that this item was not an allowable deduction, controls, the judgment was properly affirmed by the Circuit Court of Appeals on the record.

The decisions of the District Court and the CircuitCourt of Appeals, as explained by the opinions (R. 37, 44), gave effect to the "redetermination" of the tax by the Commissioner, in rejecting the application for refund, as the controlling exposition of the tax. The errors alleged are based upon this interpretation of the law. They may be summarized as follows:

1. *The Commissioner had no authority, in considering the application for refund, to "redetermine" the tax in the sense of substituting a different assessment for that which had been made.*

2. *The attempted "redetermination" of the tax was made more than five years after the date of filing the return and was therefore barred.* (Rev. Act of 1926, Sec. 277 (a) (3), 44 Stat. part 2, p.58).

3. *The attempted "redetermination" of the tax was made without the notice prescribed by statute* (Rev. Act of 1926, Sec. 283 (a), 44 Stat. part 2, p. 63) *and was therefore void for want of due process.*

4. *The circumstances under which the attempted "redetermination" was made deprived the plaintiffs of the statutory remedy of appeal from the assessment to the Board of Tax Appeals.*

5. *The decision imposed upon the plaintiffs the burden of justifying the finding of the Commissioner in the assessment of the tax and disproving his assertion in rejecting the application for refund, contrary to the established presumption in favor of the former finding.*

6. *Apart from the five year Statute of Limitations above referred to, the decision extends and increases the inter-circuit confusion of authority on the question of the extent and limitations of the power of the Commissioner to re-examine, redetermine, and re-assess a tax after the original assessment.*

ARGUMENT

I.

The Commissioner had no authority, in considering the application for refund, to "redetermine" the tax in the sense of substituting a different assessment for that which had been made.

It is believed that the decision of the Courts in this case, in respect to the point here stated, is altogether novel. Neither the Courts nor counsel have been able to find a precedent. The District Court (R. 38) cited the case of McIlhenny vs. Commissioner, 39 F. (2d) 356, which was brought to the notice of the Court after the submission of the cause. But it was pointed out in the Plaintiffs' brief in the Circuit Court of Appeals that the revision of the assessment in that case was made within the statutory period, (13 B. T. A. 288), that it was made after the statutory notice and not on an application for a refund, and that the Court expressly distinguished the proceeding from that involved in Woodward vs. Kales, (cited, infra), as involving a question of law and not a question of fact.

The Circuit Court of Appeals cited (R. 46) the case of Champ Spring Co. vs. U. S., 47 F. (2d) 1, which also came to the attention of the court after the submission of the cause. It was pointed out in the petition for re-hearing (R. 50) that the tax there involved, was voluntarily returned and paid by the taxpayer and subsequently erroneously refunded; and that the Court expressly stated (p. 2) that it was not necessary to determine whether the Collector had authority to make a re-assessment.

The only reported case which appears to offer any analogy to the proceeding here involved is Western Wholesale Drug Co. vs. U. S., 47 F. (2d) 770, in which the Commissioner undertook to justify his rejection of an application for refund of a 1919 overpayment on the ground that an error had been made in determining a credit on account of over-assessment for 1920. The time for re-assessment had passed and the Court held, as, indeed, the Solicitor of Internal Revenue had earlier advised (I-1 Com., Bul. 313), that the Commissioner had no power to withhold an overpayment for 1919 because of the claimed underpayment for 1920.

This case would seem to be merely an application of the rule plainly expressed in Rev. Act of 1928, Sec. 609, 45 Stat. 875, which reads as follows:

"(a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Sec. 607." * * * *. Sec. 607 (45 Stat. 874) reads as follows:

"Any tax * * * * assessed or paid * * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

If, in the case at bar, the letter of the Commissioner in 1929 rejecting the application for refund be treated as an assessment it seems plainly to fall under the ban of these provisions of the statute. Recognition of this result was expressed in the Commissioner's letter of May 18, 1929 (R. 23), summing up his conclusion with respect to the "redetermination" of the tax, as follows: "Since the correct computation results in an additional tax as indicated above which is barred from assessment by the Statute of Limitations your claim will be rejected", etc.

Like recognition is found in the opinion of the Circuit Court of Appeals (R. 46) where it was said:

"While no new assessment can be made after the bar of the statute has fallen the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax."

It affords little satisfaction to an aggrieved taxpayer to be thus told that there can be no new assessment, if what the Commissioner did or said be given the effect of a new assessment. Both the District Court (R. 40) and the Circuit Court of Appeals (R. 46) designated the action of the Commissioner in rejecting the application for refund as a "redetermination" of the tax. Thus a distinction seems to be drawn between a "redetermination" and a "re-assessment."

We have no wish to substitute logomachy in this connection for the process of ideation which we think is called for by the exigencies of the case. We are concerned with substance rather than words, with the nature and purpose of the act rather than definition of language.

On an application for a refund the Commissioner undoubtedly has the power, as it is his duty, to reexamine all questions of fact and of law upon which the right to repayment depends; and this manifestly involves a review of the assessment and a "determination" of the right of the taxpayer to repayment. But such determination is not a judicial or even a quasi-judicial settlement either of the facts or the law involved. It is solely concerned with the Commissioner's action—whether to pay or refuse payment. It has nothing to do with laying the tax or fixing the liability of the taxpayer.

The taxpayer's cause of action does not arise or depend upon the action of the Commissioner in granting or rejecting an application for refund; nor is the suit in the nature of an appeal from the Commissioner's decision refusing the refund. The taxpayer is not even obliged to await action on his application. At the expiration of six months he may proceed with his suit, whether the Commissioner has acted or not. In the interim his right of action is suspended.

The primary purpose of the statute requiring an application to be made before suit is "to permit the Commissioner, of his own volition upon discovery of any overpayment to credit or refund the same," ets.

Fox vs. Edwards, 287 F. 669, 673.

The requirement that an application should be made is in plain analogy to statutory or other requirements, in varying situations, that a demand shall be made before suit.

"The primary object of a demand is to enable a defendant to perform his obligation or otherwise discharge his liability without being subjected to the inconvience and expense of litigation."

1 C. J. 979

Cox vs. Delmas, 99 Calif. 104.

Hurd vs. Lodge, 20 Pick. 53

Guthrie vs. Olson, 44 Minn. 404

We believe it has never been suggested that a debtor upon whom a demand is made for payment of his debt can, by writing a letter or by other form of asseveration in his response, extinguish, alter or affect his obligation. Yet this seems to be the effect given to the Commissioner's letter rejecting the application for refund.

The "tax" involved in this suit is, of course, the same tax which was involved in the application for refund. It was the obligation defined by the assessment, which alone gave it form and substance. Of necessity the application for refund was formulated on that basis. It pointed out specificially the errors in disallowing deduction of the Wyoming Inheritance Tax of $16,870.00; the disallowance of the claim of personal exemption of $1,000.00; the computation of the tax on the first $4,000.00 at 8% instead of 4%, (R. 21-22), all of which were conceded. It made no reference to the item of $20,750.00 attorney's fees because that item had been allowed, (R. 18). This allowance was as much a constituent part of the tax as any other item which had been fixed by the assessment. The taxpayers had a right to rely upon it; indeed, they could not do otherwise than accept a finding in their favor. As this Court said in Bonwit Teller & Co. vs. U. S., 51 S. C. Rep. 395, "No statute provides for review of the Commissioner's determination in favor of taxpayers when made within the scope of his authority."

The process by which the Commissioner sought to avoid repayment is essentially a pleas of confession and avoidance. The errors specified in the application for refund and relied upon in the suit were errors of law appearing upon the face of the assessment. They were established by cumulative decisions of the courts, finally recognized by statute and conceded by the Commissioner in his letter of May 18, 1929, (R. 23). No new facts were then brought forward by the taxpayer or by the Commissioner. In his letter rejecting the application he described his action as a correct "computation" resulting in an additional "tax". In the opinion of the District Court (R. 38) the process was described as a modification and "change of the assessment" schedules, and in the opinion of the Court of Appeals (R. 46) it was described as a "redetermination of the entire tax liability."

This graduated evolution from a "computation" through a "change of assessment" into the "redetermination of the entire tax liability", as it was characterized by the Court of Appeals leaves no room for doubt that the Commissioner's letter rejecting the claim for refund was given full effect as a determination or assessment of the tax, superseding the assessment of 1925 upon which payment was made. Thus the "additional tax", which the Commissioner admitted was barred from assessment (R, 23), becomes the only tax considered in the case; and while, as the Court of Appeals said, (R. 46),"No new assessment can be made," the letter is treated as a substitute, eliminating the taxpayers' cause of action and tendering a new issue with added burdens; all of which was the irrelevant, unprovoked and unwarranted consquence of a demand for the payment of money due.

What the Commissioner did and what the Courts sanctioned in this case was to apply an admitted overpayment of the tax assessed upon an asserted claim of a tax for the same year, differently constituted and assumed to be assessed without notice, after the finding regularly made in the timely assessment of the tax. Apart from the specific objections discussed, infra, the petitioners submit that such action has none of the characteristics of a statutory assessment and that no "tax" in any proper or leagl sense can be predicated thereupon.

In the District Court, counsel for the defendant contended that since the Commissioner had conceded the errors claimed on the application for refund, the suit could not be maintained because the plaintiffs had not sought a refund or based their suit upon the disallowance of the item of $20,750.00. And in the Circuit Court of Appeals they suggested that "an alert taxpayer would have immediately filed another claim if it thought there was any foundation for it." The futility of this contention seems self evident. The taxpayers set up the only ground for refund which existed or arose upon the assessment made and the tax exacted. They had made no payment and could not be required to pay on the basis of the Commissioner's redetermination in rejecting the application. There was in fact, no such tax and none could be assessed as the Commissioner and Court of Appeals expressly admitted. Moreover, a

new application for refund would have invited a new "redetermination" and each succeeding application would be the occasion for another "redetermination". If the Commissioner and the Courts have correctly interpreted the law, it must be left to the imagination to conjecture just how nimble, patient and persistent a taxpayer would need to be to bring this circular procedure to an end. Taxpayers are mortal; the Commissioner has the advantage of a continuous entity-an official immortality which must outlast the taxpayer in any such a contest.

II

The attempted "redetermination" of the tax was made more than five years after the date of filing the return and was therefore barred. (Rev. Act of 1926, Sec. 277 (a) (3), 44 Stat. Part 2, P. 58).

The additional assessment involved was made by the Commissioner November 24, 1925 (R. 17-19). As the return was filed February 18, 1921, the period for assessment expired February 18, 1926 under the terms of the applicable Revenue Act of 1918, Sec. 250 (d), 40 Stat. 1083, (continued in subsequent acts) which read as follows:

(d) "Except in the case of false or fraudulent returns, with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made."

As we have already pointed out, the decisions of the Courts below gave effect to the Commissioner's letter on May 18, 1929, as a "redetermination" of the tax which we have assumed is equivalent to a reassessment, as these words are apparently used, in this connection, interchangeably.

The statute does not seem to require construction although numerous attempts are found among the reported cases to avoid its effect. If the statute were deemed to require or admit of interpretation it is a recognized rule that this, like other provisions of the tax acts, is to be construed liberally in favor of the taxpayer.

U. S. vs. Updike, 281 U. S. 489, 496.
U. S. vs. Michel, 51 S. C. Rep. 284.

In one aspect the present case may be regarded as an attempt to collect an undetermined or unassessed tax by applying, as a credit, the overpayment found by the Commissioner to be due the plaintiffs on the assessment actually made.

In principle, we perceive no difference between such an attempt and an attempt to apply an overpayment for one year on a tax for a different year; nor does it seem that any such difference is contemplated by Rev. Act of 1928, Sections 607 and 609, (45 Stat. 874, 875) above cited.

Section 609, by its express language, forbids a credit upon a barred tax liability of "any" year; it need not be a liability of another or a different year. If the liability is one which is barred from assessment it cannot be indirectly collected by crediting an overpayment.

In effect such seems to be the nature of the attempt in the present case. Overpayment of the tax assessed was admitted and it was also admitted that an assessment of the alleged liability for that year was barred. If Sections 607 and 609 are to have any application at all it would seem that they must operate upon such a condition. The case seems to come well within the reason of the rule laid down by this Court in Bowers vs. New York and A. Lighterage Co., 273 U. S. 346, 350, 351, where it was said of a limitation on tax collections that "the provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. * * * * A reasonable view of the matter is that it was the intention of Congress, by the clause here in question to protect taxpayers against any proceeding whatsoever for the collection of tax claims not made and presented within five years."

The device employed by the Commissioner in the case at Bar must be considered as a method of collecting a tax which had not been assessed within the statutory period and which cannot thereafter be assessed, as the Court of Appeals expressly stated in its opinion.

The decision sustaining the action of the Commissioner in this case is essentially in conflict with the decision of this Court in Bonwit Teller and Co. vs. U. S. 51 S. C. Rep. 395, cited un-

der the first point in this brief. Aside from the informality of the claim for refund in that case there is a marked anoligy between its material facts and the facts in the case at Bar.

In both cases the Commissioner decided that there was an over-assessment. In the Bonwit Teller case he had withheld a part of the allowance to offset a claimed deficiency in the tax of a former year, as in the case at Bar he withheld the allowance for a claimed deficiency in the tax for the same year. In neither case was the claimed deficiency assessed within the statutory period. As we have pointed out above, the statute (Rev. Act 1928, Sec. 607 and 609, 45 Stat. 874, 875) which prohibits the setting off of an overpayment against a tax liability for "any" year unless such tax has been assessed within the statutory period applies equally to a liability for the same year or for another year. The essential rule applied in the Bonwit Teller case therefore controls the rights of the parties in this case and justifies the plaintiffs' claim. The same rule was applied in Western Wholesale Drug Co., vs. U. S., 47 Fed. (2d) 770, and was also earlier laid down in an opinion of the Solicitor of Internal Revenue in I-1 Cumulative Bulletin, 313, Supra.

III

The attempted "redetermination" of the tax was made without the notice prescribed by statute (Rev. Act of 1926, Sec. 283 (a) 44 Stat. 63) *and was therefore void for want of due process.*

The comprehensive taxing power of the Federal Government has always borne certain fundamental limitations. The Sixteenth Amendment to the Constitution removed one of the most important of these; but the Fifth Amendment is still operative; and its restraining effect was stated by this Court, as an axiom of tax procedure in Lipke vs. Lederer, 259 U. S. 557, 562, as follows: "Before collection of taxes levied by statutes enacted in plain pursuance of the taxing power can be enforced; the taxpayer must be given fair opportunity for hearing,--this is essential to due process of law."

The tax legislation of Congress has proceeded, we believe, from the beginning in recognition of this fundamental principle; and while the details of procedure have undergone changes from time to time, the right to a hearing in some form has always been recognized. In Rev. Act of 1918, (40 Stat. 1141, Sec. 1301, (d) (1)), provision was made for an Advisory Tax

Board in the Bureau of Internal Revenue to which, at the election of the Commissioner or the taxpayer, any question relating to the interpretation or administration of the income etc., tax laws might be submitted for an advisory report.

By the Rev. Act of 1924, Sec. 900 (43 Stat. 335) the Board of Tax Appeals was established with power to hear and determine appeals in deficiency assessments and claims in abatement. That act made important modifications in the procedure prescribed for making deficiency assessments. By Sec. 274 (a) 43 Stat. 297, (substantially reenacted in succeeding Revenue Acts, including Rev. Act of 1926, Sec. 283 (a) 44 Stat. 63,) it was provided that "if in the case of any taxpayer the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer * * * * shall be notified of such deficiency by registered mail, but such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided."

The taxpayer thereupon was given sixty days after the presecribed notice within which to file an appeal with the Board of Tax Appeals; and the determination of the Board was made binding upon the Commissioner; but a proceeding in Court was authorized without assessment for the collection of any part disallowed by the Board.

The historical development of the procedure is set out in some detail in the opinion of the Court in Joseph Garneau Co. vs. Bowers, 8 Fed. (2d) 378, and the essential changes are more succinctly stated in Williamsport Wire Rope Co. vs. U. S., 277, U. S. 551, 562.

The result of this development in tax procedure is to establish two methods of tax collection: (1) By assessment initiated by the Commissioner with notice to the taxpayer involving the right of appeal to the Board. In the absence of appeal the Commissioner's assessment stands. If an appeal is taken the Commissioner's power of assessment ceases and passes to the Board. (2) By a proceding in Court without assessment for the collection of any part of the Commissioner's determination disallowed by the Board. (Rev. Act 1924, Sec. 274 (b) 43 Stat. 277).

The procedure thus established for the determination of deficiency taxes is in sharp contrast to the procedure involved in the Commissioner's letter of May 18, 1929 asserting a "redetermination" of the tax liability of the plaintiffs in this case. It is submitted therefore, that, apart from any other question involving its validity, such "redetermination" was altogether lacking in the element of due process guaranteed by the Constitution and prescribed by applicable statutes.

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode."

Botany Worsted Mills vs. U. S., 278, U. S., 282, 289.

IV.

The circumstances under which the attempted "redetermination" was made deprived the plaintiffs of the statutory remedy of appeal from the assessment to the Board of Tax Appeals.

Little need be said in support of this exception. The jurisdiction of the Board is statutory and special. Except in the case of a "jeopardy" assessment (not here involved) it arises upon the giving of the so-called "sixty day notice" under Rev. Act of 1926, Sec. 283 (a) (44 Stat. Part 2, p. 63.) providing that "if after the enactment of this act the Commissioner determines that any assessment should be made in respect of any income * * * * tax imposed by * * * * the Rev. Act of 1928 * * * * the Commissioner is authorized to send by registered mail to the person liable for tax, notice of the amount proposed to be assessed;" whereupon under the provisions of Sec. 274 (a) 44 Stat. Part 2, p. 55) the taxpayer is given sixty days to appeal to the Board for a redetermination.

In the case of Antoinette J. Mitchell vs. Com., (Docket No. 38023, April 29, 1931, not yet officially reported in full,) the Board, referring to previous decisions, held that the statutory method of notice is exclusive and that where the notice had not been sent to the proper person or address the Board had no jurisdictio n of an appeal from a proposed deficiency assessment and could pass upon no further question than that of jurisdiction.

In the case of French vs. Com., 10 B. T. A., 665, 666, and in previous cases the Board had held that it had no jursidiction over a proceeding arising solely from the rejection of a claim for refund.

Inasmuch as the sole occasion for the action of the Commissioner in the case at Bar was the plaintiffs' application for a refund, and cumulatively for the additional reason that no notice was given as required by statute, it is submitted that the Board of Tax Appeals would properly decline to entertain an appeal. It is the manifest intent of the statute that such appeal should be allowed in every case involving a deficiency assessment, and, by the course of procedure upheld by the Courts in this case, the plaintiffs have been deprived of that right.

V.

The decision imposed upon the plaintiffs the burden of justifying the finding of the Commissioner in the assessment of the tax and disproving his assertion in rejecting the application for refund, contrary to the established presumption in favor of the former finding.

The District Court found, as shown in the statement of the case, supra, that the Commissioner, in November 1925, redetermined the tax in question, finding that the greater portion of the item of $20,750.00 attorneys' fees represented a "business" expense of the estate, and allowed the same as a deduction. The Court further found that on May, 18, 1929 in rejecting the claim for refund the Commissioner advised that this item was disallowed as an "administrative" expense.

Upon this state of facts the District Court held (R. 40.) that "in a suit to recover alleged illegal taxes collected, the burden of proving the illegality rest upon the taxpayer * * * * and in the strict application of the latter principle as concerns the item of attorneys' fees, the burden placed upon the taxpayer has not been discharged by plaintiffs' showing in this case."

The Court of Appeals held (R.46) that "the action to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the United States has money which belongs to him * * * * Since in the instant case the trustees had not overpaid the tax, the claim for refund was properly denied."

In the discussion of point I. supra, we called attention to the fact that the action was not based on the rejection of the claim for refund but rather on the overpayment of the tax assessed; that the errors assigned in the claim for refund were conceded but that the Commissioner asserted an offset by reversing his position on the item of attorneys' fees. Therefore, if there was any failure on the part of the plaintiffs to sustain the burden of proof, it was a failure with respect to the item of attorneys' fees.

The position of the defendant was thus essentially a plea of confession and avoidance although the answer in the case (R. 4) gave no hint of such a defense. If the government had availed itself of the statutory provision for collection by suit, without assessment, it would, of course, have had the burden of proof on this point. The position of the defendant would manifestly have been no stronger if a plea of confession and avoidance had been interposed in the present suit.

The familiar rule, quoted from the opinions of the lower courts, relating to the burden of proof in an action for money had and received, means, we think, no more than it is incumbent upon the plaintiff to show a prima facie right sanctioned by law and equity; not that he must show that the defendant has no potential right nor can establish any kind of a claim. The rule, we understand, grew out of the common law practice of pleading in an action in assumpsit, where a very general form of statement was employed, and would seem to be of only limited application in a case like this where the specific facts were set out in detail. (R. 1-3.)

It was contended in the petition for rehearing (R. 52) that the plaintiffs were entitled to rely upon the presumption, usually invoked by the Government, but here available to the tax payers, that the assessment is correct, and that the party attacking the assessment has the burden of proof; and that apart from this established rule in revenue cases it is an accepted principle of legal procedure in actions for money had and received, that if any facts exist which take the case out of the general rule and exempt the defendant from liability the burden is upon him to show these facts.

This rule would seem to be of full application to the position of the parties in the present case in view of the established doctrine in tax cases interpretation of statutes levying taxes, it is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen". (Gould vs. Gould, 245 U. S. 151; U. S. vs. Merriam, 263 U. S., 179, 187.)

The rule has been frequently applied in proceedings before the Board of Tax Appeals, and the burden placed upon the defendant as against the taxpayer, where the Commissioner has undertaken to avoid the taxpayer's contention by asserting a counter error (General Lead Batteries Co. vs. Com., 2 B. T. A., 392, 395; Berkshire Cotton Mfg. Co. vs. Com., 5 B. T. A., 1230, 1242, 1242; Schilling Grain Co. vs. Com, 8 B. T. A., 759, 762-763; Texas and Pacific R. Co. vs. Com., 9 B. T. A., 365; McFetridge vs. Com., 9 B. T. A., 759, 762-763; Wolferman vs. Com., 10 B. T. A., 285, 287; Crider Bros. Com. Co. vs. Com., 10 B. T. A., 348, 350; Henderson Tire and Rubber Co. vs. Com., 12 B. T. A., 716, 720.); where reliance is placed upon a letter of the Commissioner seeking to set up a greater deficiency; (Fowler vs. Com., 6 B. T. A., 250, 254-255); where the Commissioner relied upon an exception to the statute of limitations, (Farmers' Feed Co., vs. Com., 10 B. T. A., 1069, 1072.)

In the case at bar there was no plea of error or offset, no suggestion of fraud, no explanation for the reversal of the Commissioner's finding of fact with respect to the character of the deduction, no reassessment, no opportunity of hearing afforded the taxpayer. On the contrary the power to make an assessment was expressly disclaimed. It seems to us that it would be an anomaly in judicial procedure in general, and particularly in tax cases, if when overpayment of a particular assessment has been admitted, the Government could avoid restitution by the suggestion that facts existed or that different form of assessment might have been adopted which would create an apparent liability.

When one reflects that a tax is an involuntary contribution imposed upon the citizen for the necessary support of the government, which he must pay first and challenge afterward; that the legislative power to prescribe the conditions and the rate of taxation is comprehensive and well nigh unlimited; that the administrative officers are clothed with an initiative and a discretion in the performance of their functions, which reduces the taxpayer to a role of passivity and patience, the importance and necessity of a judicial remedy at the end of the process becomes manifest. Hence it is that the courts have firmly established the principle that when a claimed tax liability which has not been assessed is subjected to judicial scrutiny the taxing power has the burden of justifying it; that it must show a tax obligation clearly authorized by express statute; that it must account for a definite charge upon the particular taxpayer through timely procedure with due process by the officers charged by law with the necessary functions of assessment and collection.

VI.

Apart from the five year Statute of Limitations above referred to the decision extends and increases the inter-circuit confusion of authority on the question of the extent and limitations of the power of the Commissioner to re-examine, redetermine, and reassess a tax after the original assessment.

Within the past three years, in a series of decisions involving the extent of the Commissioner's power to redetermine a tax within the statutory period, an apparent conflict has arisen between the Circuit Courts of Appeals in at least four of the circuits. It does not appear to us that the views expressed in the different opinions are reconcilable with each other, but whether the particular cases involved are susceptible of being so distinguished from one another upon the facts, that a direct conflict may be avoided, there is unquestionably an impression among the Courts that they constitute diverging lines of authority.

While the case at Bar is not ruled exclusively by the decisions of this particular class, nevertheless the question is directly and fairly involved. If this Court determines to en-

tertain and review the present case, it is submitted that the question here propounded should be considered and determined.

The Circuit Court of Appeals of the Sixth Circuit, in Woodward vs. Kales, 26 Fed. (2d) 178, discussed exhaustively the power of the Commissioner to review an assessment on a question of fact (profit on sale of stock) and held that in the absence of fraud, etc., such authority did not exist.

The Circuit Court of Appeals of the Second Circuit, in Loewy vs. Com 31 Fed. (2d) 652, upheld a determination of the tax (disallowance of depreciation reserve for bad debts) where there had been an agreement between the taxpayer and the Commissioner, waiving the limitation and consenting that an assessment might be made. The Court called attention to the fact that there had been no previous assessment.

The Circuit Court of Appeals of the Eighth Circuit, in Holmquist vs. Blair, 35 Fed (2d) 10, decided that a previous assessment against a corporation involving the rate of depreciation to be used in determining the gain on a sale of capital assets would not preclude the Commissioner from considering and determining that question anew in assessing the income of its stockholders deprived from liquidating dividends.

The Circuit Court of Appeals of the Sixth Circuit, in Austin Co. vs. Com., 35 Fed. (2d) 910, (without disapproving the doctrine of Woodward vs. Kales, supra), by a majority decision, upheld the action of the Commissioner in setting aside a previous special assessment and redetermining the tax, assuming that he acted on new evidence of the facts.

The Circuit Court of Appeals of the Third Circuit, in McIlhenny vs. Com., 39 Fed. (2d) 356, upheld a redetermination by the Commissioner involving a question of loss sustained by the taxpayer heir on sale of assets of his father's estate in process of administration-apparently a question of law.

A District Court within the Sixth Circuit, in Boyne City Lumber Co. vs. Doyle, 47 Fed. (2d) 772, recently followed the doctrine of Woodworth vs. Kales, supra, in denying the power of the Commissioner to redetermine without new evidence a question of value which had been determined in a previous regular assessment.

Evidence of the general recognition of a conflict among the decisions on this subject is seen in the references to the cases in Holmquist vs. Blair; McIlhenny vs. Com.; and Boyne City Lumber Co. vs. Doyle, supra.

All of these cases involved redeterminations made or attempted within the statutory period upon formal notice of the taxpayer, with the avowed object of reassessment, and with opportunity for appeal. In all these respects they are distinguishable from the present case which turns upon the authority of the Commissioner to redetermine the tax when acting upon an application for refund after the statutory period and without notice of reassessment.

It is submitted, therefore, that because of the novelty of the proceeding here involved, the effect given by the Court to the Commissioner's action, the manifest bearing it potentially has upon every tax recovery case, the obscurity which the decision casts upon the statute of limitations upon assessments, the disregard of the Constitutional and statutory requirements of due process in the matter of hearing before the Commissioner and review by the Board of Tax Appeals, the reversal of the settled rule in respect to the burden of proof, and finally because of the growing confusion of doctrine on the power of the Commissioner to reassess,-all of which conditions are prolific causes of litigation, the public interest calls for the authoritative and final decision of this Court.

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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1931

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS TRUSTEES UNDER THE WILL OF ARTHUR FRANCIS THOMAS COOPER, DECEASED, PETITIONERS

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	7

CITATIONS

Cases:

Bonwit Teller & Co. v. *United States*, No. 282, October Term, 1930 — 6

Burnet v. *Porter*, No. 203, October Term, 1930 — 5

Graham & Foster v. *Goodcell*, 282 U. S. 409 — 4

Levy v. *Commissioner*, 48 F. (2d) 725 — 6

Magee v. *United States*, 37 F. (2d) 763, affirmed, 282 U. S. 432 — 5

McCarl v. *Leland*, 42 F. (2d) 346, certiorari denied, 282 U. S. 830 — 5

Onondaga Co. v. *Commissioner*, (C. C. A. 2d), decided June 8, 1931 — 6

Suhr v. *United States*, 18 F. (2d) 81 — 6

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085.

Sec. 250 — 8

Sec. 252 — 8

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 58, 63, 66—

Sec. 274 — 9

Sec. 277 — 9

Sec. 283 — 10

Sec. 284 — 4, 10

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875—

Sec. 607 — 4

Sec. 611 — 4

Revised Statutes, Sec. 3226, as amended by Sec. 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343 — 11

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS Collector of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 37–40) is reported as *Collinson* v. *Reynolds* in 43 F. (2d) 395. The opinion of the Circuit Court of Appeals (R. 44–46) is reported in 48 F. (2d) 515.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1931. (R. 47.) Petition for a writ of certiorari was filed May 27, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Commissioner of Internal Revenue was justified in rejecting a claim for refund of income taxes under the following circumstances:

The claim for refund asked for the allowance of a certain deduction which had previously been refused, but which should have been granted. The amount of this deduction was less than the amount of a deduction on account of another matter which the Commissioner had erroneously allowed. The time allowed by statute for assessment of the tax had expired when the Commissioner rejected the claim for refund.

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix, *infra*, pp. 11–15.

STATEMENT

This suit was brought in the District Court for the District of Wyoming. A jury having been waived, the following findings of fact were made by the court (R. 6–8):

The administrator of an estate filed with the Commissioner of Internal Revenue a Federal income tax return for the period from January 1 to December 12, 1920. In this return deduction was claimed for attorney's fees of $20,750, and for a Wyoming inheritance tax of $16,870. The Commissioner originally disallowed the deduction claimed for the Wyoming inheritance tax, but

allowed the deduction claimed for the attorney's fees, and the amount of the tax determined on this basis was paid.

On July 29, 1926, the administrator filed a claim for refund, asserting the right to deduct the amount of the Wyoming inheritance tax, besides some other smaller items which need not be considered here. By letter dated May 18, 1929, the Commissioner advised him that the amount of the inheritance tax paid to the State of Wyoming was allowed as a deduction for 1920, but that the sum representing the amount of attorney's fees, which had been claimed as a deduction in the return, had been disallowed, and the claim for refund was rejected. (R. 22–24.) A computation of the tax resulting from the foregoing adjustments was set forth, showing an amount due the Government in addition to that already paid for the year, but the letter stated that the assessment of this additional tax was barred by the statute of limitations. (R. 23–24.)

The present suit was brought to recover the refund claimed on account of the Wyoming taxes. The District Court gave judgment for the defendant. (R. 8–9.) The Circuit Court of Appeals for the Tenth Circuit affirmed this judgment. (R. 47.)

ARGUMENT

As the petitioners assert, the question here involved is novel. Their brief makes an able argument to the effect that the decision below is wrong. We do not regard the question as free from doubt, but submit that the following argument in behalf

of the Government, which prevailed in both of the courts below, is sound.

We submit that a refund of income taxes can not be made unless the amount actually paid exceeds the tax properly due on the total taxable income for the year in question.[1]

Under the Revenue Act of 1926, as under prior revenue acts, the allowance of a refund is predicated on an actual overpayment of taxes. Section 284 (a) of that Act (*infra*, p. 13), which was in effect when the claim for refund in the instant case was filed and rejected, provides for the allowance of refunds where there is "an overpayment" of taxes and a balance remains after crediting such excess against any other taxes due but unpaid. The language of the statute discloses no intent to allow a refund unless the taxpayer has paid a larger amount for the year in question than the total tax due for that year. See *Magee* v. *United States*, 37 F. (2d) 763 (C. Cls.), affirmed on other grounds by this Court, 282 U. S. 432; *McCarl* v. *Leland*, 42 F. (2d) 346 (App. D. C.), certiorari denied, 282 U. S. 839.

The court below held that there had been no overpayment of tax in this case since the correct tax

[1] It is true that Sections 607 and 611 of the Revenue Act of 1928 provide that under certain circumstances a tax paid after its collection is barred by the statute of limitations is to be credited or refunded, but it is noteworthy that Section 607 states that payment of such a tax "shall be considered an overpayment." See *Graham & Foster* v. *Goodcell*, 282 U. S. 409.

was in excess of that paid. The petitioners do not urge that the deduction for attorney's fees, which the Commissioner disallowed, constituted an allowable deduction or deny that the computation of the tax resulting from the disallowance of this item and the allowance of the deduction for Wyoming inheritance taxes and other small items is a correct computation. Their contention is merely that the Commissioner had no power to disallow this item, which he had formerly allowed, in determining whether to make a refund for 1920, since the statute of limitations had run as to any additional assessment for that year.

In the absence of a closing agreement the Commissioner may make redeterminations of tax liability, and may assess the taxes found due as the result of such determination provided the statute of limitations has not run. *Burnet* v. *Porter,* No. 203, October Term, 1930, decided by this Court April 13, 1931. Because of that decision, it is unnecessary to consider the earlier cases in the lower Federal courts which petitioners cite.

It is true that the assessment of any deficiency based on a redetermination of tax liability was barred at the time when the last computation in this case was made and the claim for refund was rejected, but the Commissioner has made no attempt to assess or collect the deficiency and is merely seeking to retain taxes already collected and legally due. For that reason we submit that the

petitioners' contentions that the Commissioner has disregarded the statute of limitations and has failed to give the taxpayer the notice of deficiency and the opportunity to appeal to the Board of Tax Appeals required by law are without merit.

The fact that no additional tax could be assessed and collected does not affect the necessity for a correct computation. In ascertaining whether an excessive payment has been made the Commissioner should not be confined to the matters set forth in the claim for refund. *Suhr* v. *United States,* 18 F. (2d) 81 (C. C. A. 3rd). This is a corollary to the rule that the Commissioner can not determine a deficiency without taking into consideration the amount of previous refunds, whether erroneous or otherwise. *Levy* v. *Commissioner,* 48 F. (2d) 725 (C. C. A. 9th); *Onondaga Co.* v. *Commissioner* (C. C. A. 2d), decided June 8, 1931, and as yet unreported.

The case of *Bonwit Teller & Co.* v. *United States,* No. 282, October Term, 1930, decided April 13, 1931, relied upon by petitioners involved the validity of a claim under Section 281 (e) of the Revenue Act of 1924 as amended, and does not seem to us to bear on the question in the instant case.

The other cases cited by petitioner apply to situations different from that here involved, and the decisions in those cases are not inconsistent with the instant case.

CONCLUSION

The instant case is not in conflict with any applicable decisions, and the question presented is not of sufficient importance to justify a review by this Court. The petition should be denied.

Respectfully submitted.

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Of Counsel.

JULY, 1931.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085:

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer

under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 58, 63, 66:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *
(U. S. C. App., Title 26, Section 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no pro-

ceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Section 1057.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1918, * * * or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act. (U. S. C. App., Title 26, Section 1064.)

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1918, * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or install-

ment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer. (U. S. C. App., Title 26, Section 1065.)

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *.

Section 3226 of the Revised Statutes as amended by Section 1014 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343:

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commis-

sioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

"(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act." (U. S. C., Title 26, Section 156.)

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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1931

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS TRUSTEES UNDER THE WILL OF ARTHUR FRANCIS THOMAS COOPER, DECEASED, PETITIONERS

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	4
Argument:	
I. In acting upon a claim for refund based upon the disallowance of a particular deduction, the Commissioner of Internal Revenue has authority to reaudit the return and to reject the claim on the basis of the disallowance of another deduction even though the statute of limitations prevents him from making an additional assessment for the year involved	6
II. The case does not involve any attempt on the part of the Commissioner to credit an overpayment against an outlawed assessment or to assert a deficiency without giving an opportunity for a hearing	17
III. Even if the Commissioner's action in rejecting the claim for refund as the result of disallowing the item for attorney's fees was erroneous, petitioners can not recover in this suit	24
Conclusion	26
Appendix	27-36

CITATIONS

Cases:

Blair v. *Bickenstock*, 271 U. S. 348	13, 15, 18
Bowcit Teller & Co. v. *United States*, 283 U. S. 258	17, 21
Botany Mills v. *United States*, 278 U. S. 282	10
Brewster v. *Gage*, 280 U. S. 327	19
Burnet v. *Porter*, 283 U. S. 230	10
Burnet v. *Railway Equipment Co.*, 282 U. S. 295	16
Camp v. *United States*, 44 F. (2d) 126	13
Campbell v. *Holt*, 115 U. S. 620	16
Carter Music Co., J. W., v. *Bass*, 20 F. (2d) 390	26
Champ Spring Co. v. *United States*, 47 F. (2d) 1, certiorari denied, 283 U. S. 852	24
Danzer Co., William, v. *Gulf R. R.*, 268 U. S. 633	16
Graham & Foster v. *Goodcell*, 282 U. S. 409	17
Levy v. *Commissioner*, 48 F. (2d) 725	14
McCarl v. *United States ex rel. Leland*, 42 F. (2d) 346, certiorari denied, 282 U. S. 839	9

Cases—Continued. Page

Magee v. *United States*, 37 F. (2d) 763, affirmed, 282 U. S. 432 ... 9

Mascot Oil Co. v. *United States*, 42 F. (2d) 309, affirmed, 282 U. S. 434 ... 15

New York Life Ins. Co. v. *Anderson*, 263 Fed. 527, certiorari denied, 256 U. S. 696 ... 26

Ohio Steel Foundry Co. v. *United States*, 38 F. (2d) 144 ... 13

Old Colony R. Co. v. *United States*, 27 F. (2d) 994 ... 13

Old Colony Tr. Co. v. *Commissioner*, 279 U. S. 716 ... 13

Philadelphia, City of, v. *The Collector*, 5 Wall. 720 ... 26

Stange v. *United States*, 282 U. S. 270 ... 16

Suhr v. *United States*, 18 F. (2d) 81 ... 12

United States v. *John Barth Co.*, 27 F. (2d) 782, reversed, 279 U. S. 370 ... 16

United States v. *Pusey*, 47 F. (2d) 22 ... 9

United States v. *Swift & Co.*, 282 U. S. 468 ... 9, 20

United States v. *Whyel*, 28 F. (2d) 30, certiorari dismissed, 278 U. S. 664 ... 15

Universal Battery Co. v. *United States*, 281 U. S. 580 ... 24

Western Wholesale Drug Co. v. *United States*, 47 F. (2d) 770 ... 17, 22

Wright & Taylor v. *Lucas*, 34 F. (2d) 328, affirmed, 282 U. S. 409 ... 15

Statutes:

Act of March 4, 1923, c. 276, 42 Stat. 1504 ... 29

Act of March 13, 1924, c. 55, 43 Stat. 22 ... 29

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085—

Sec. 250 ... 27

Sec. 252 ... 27–28

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, 268—

Sec. 250 ... 28

Sec. 252 ... 29

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, 343—

Sec. 277 (U. S. C. Title 26, sec. 1057) ... 29

Sec. 281 (U. S. C. Title 26, sec. 1065) ... 30

Sec. 1014 (U. S. C. Title 26, sec. 156) ... 30

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 58, 63, 66, 74, 116—

Sec. 273 (U. S. C. Sup. IV, Title 26, sec. 1047) ... 14

Sec. 274 (U. S. C. Sup. IV, Title 26, sec. 1048) ... 31

Sec. 277 (U. S. C. Sup. IV, Title 26, sec. 1059) ... 32

Sec. 283 (U. S. C. Sup. IV, Title 26, sec. 1064) ... 32

Sec. 284 (U. S. C. Sup. IV, Title 26, sec. 1065) ... 33

Sec. 307 (U. S. C. Sup. IV, Title 26, sec. 1100) ... 14

Sec. 1113 (U. S. C. Sup. IV, Title 26, sec. 156) ... 30

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, 878—

Sec. 607 (U. S. C. Sup. IV, Title 26, sec. 2607) ... 34

Sec. 608 (U. S. C. Sup. IV, Title 26, sec. 2608) ... 34

Sec. 609 (U. S. C. Sup. IV, Title 26, sec. 2609) ... 35

Sec. 619 (U. S. C. Sup. IV, Title 26, sec. 149) ... 35

Revised Statutes, Sec. 3226 ... 14

Miscellaneous:

	Page
A. R. M. 123, C. B. 4, p. 330	19
House Conf. Rep. 844, 68th Cong., 1st Sess., pp. 24–25	20
H. R. 179, 68th Cong., 1st Sess., p. 27	20
I. T. 1447, C. B. I–2, p. 220	18
S. R. 398, 68th Cong., 1st Sess., p. 33	20
Sol. Op. 79, C. B. 3, p. 302	19
T. D. 3260, C. B. 3, p. 243	19
Treasury Regulations 65, Art. 1304	36

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, As Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the District of Wyoming (R. 37–40) is reported *sub nom. Collinson* v. *Reynolds* in 43 F. (2d) 395. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 41–44) is reported in 48 F. (2d) 515.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1931. (R. 44.) The petition for a writ of certiorari was filed May 27, 1931, and the writ was granted October 12, 1931. (R. 45, 46.) Jurisdiction is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

An income tax return for the year 1920 claimed deduction of attorney's fees and of inheritance taxes paid, the first being the larger item. The Commissioner erroneously allowed the first and disallowed the second. A claim for refund was filed on account of the disallowance of the deduction for inheritance taxes. May the Commissioner, after the period for making an additional assessment of 1920 taxes has expired, reject the claim on the ground that, since the attorney's fees had been erroneously deducted in computing the tax, there was no overpayment of tax?

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in the Appendix, *infra,* pp. 27–36.

STATEMENT

This suit was brought in the District Court for the District of Wyoming to recover $7,297.16 with interest. A jury was waived and the following

facts (which are not in dispute) are contained in the findings of fact made by the District Court (R. 6–8):

Arthur Francis Thomas Cooper died December 8, 1918. On February 8, 1921, the administrator of his estate filed with the Commissioner of Internal Revenue an estate income tax return for the taxable period January 1 to December 12, 1920, final settlement of the estate having been made on the latter date. The return showed a tax liability of $13,082.61, which was paid. (R. 6–7.)

In this return a deduction was claimed for attorney's fees in the sum of $20,750 and for a State inheritance tax of $16,870. In the audit and review of the return, made in connection with the report of a revenue agent, the Commissioner disallowed the deduction claimed for the inheritance tax but allowed the deduction for attorney's fees. (R. 7.) On this basis the Commissioner determined that there was an additional tax liability of $7,297.16, which amount was paid by respondents on March 20, 1926. (R. 7.)

On July 29, 1926, the administrator filed a claim for refund of such additional tax. He based it upon the action of the Commissioner in disallowing as a deduction from gross income the amount of the State inheritance tax, $16,870, and in making certain minor adjustments which need not be considered here. (R. 7, 21–24.)

By letter dated May 18, 1929, the Commissioner advised the administrator that the amount of the

inheritance tax was allowed as a deduction for 1920, but that the sum of $20,750 representing attorney's fees, which had been claimed as a deduction in the return, had been disallowed, and that the claim for refund would be rejected. (R. 22–24.) The letter contained a computation of the tax resulting from the foregoing adjustments. (R. 23.) This computation showed an amount due the Government in addition to that already paid for the year, but the letter stated that the assessment of the additional tax was barred by the statute of limitations. (R. 7–8, 23.) No attempt has been made to collect it. (R. 8.)

The present suit was filed by the trustees under the will of decedent to recover $7,297.16 and interest, the refund claimed to be due as the result of allowing the State inheritance-tax deduction and certain small items of administration expense. (R. 1–3, 8.) The latter items were waived at the trial. (R. 8.) No evidence was adduced to show nor is any claim made that the attorney's fees were allowable deductions from gross income.

The District Court gave judgment for the defendant. (R. 8–9.) The Circuit Court of Appeals for the Tenth Circuit affirmed this judgment. (R. 44.) This Court granted a writ of certiorari on October 12, 1931.

SUMMARY OF ARGUMENT

The Commissioner rejected the claim for refund on the ground that, while the item forming the

basis of the claim should be deducted, the disallowance of other items showed an additional tax due, though it could not be collected because of the statute of limitations.

While the statutes authorizing refunds do not specifically authorize the Commissioner to reaudit the returns of the taxpayer in connection with claims for refund, such authority is necessarily implied because refunds are authorized only in case of overpayments. Moreover, in the absence of a closing agreement and subject to his inability to assess a tax after the expiration of the statutory period, he may redetermine a tax at any time. It has been the practice of the Internal Revenue Bureau, at least since 1918, to audit or reaudit returns in connection with refund claims. The practice is a matter of convenience to taxpayers and to the Government in disposing of the entire controversy over tax liability at one time.

The rule is not otherwise when the Commissioner's right to make an additional assessment for the year involved has expired. The running of the statute does not do away with the necessity of determining whether there has been an overpayment. It bars assessment and collection of any additional tax, but does not affect the right to retain taxes already assessed and collected, which are recoverable only if overpaid. The liability for the tax is not extinguished by the running of the statute, though the remedy is barred.

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Sections 607 and 609 of the Revenue Act of 1928 apply only to a credit of an overpayment for one year against a tax liability for another year; hence those statutes and the decisions under them have no application.

Nor is the Commissioner's action objectionable on the ground that the Commissioner asserted a deficiency without giving an opportunity to appeal to the Board. No deficiency has been asserted.

Even if the Commissioner's action in rejecting the claim for refund was erroneous, this suit, which is in the nature of an action for money had and received, can not be maintained, for petitioners have failed to establish that respondent has money to which, in equity and good conscience, they are entitled.

ARGUMENT

I

IN ACTING UPON A CLAIM FOR REFUND BASED UPON THE DISALLOWANCE OF A PARTICULAR DEDUCTION, THE COMMISSIONER OF INTERNAL REVENUE HAS AUTHORITY TO REAUDIT THE RETURN AND TO REJECT THE CLAIM ON THE BASIS OF THE DISALLOWANCE OF ANOTHER DEDUCTION EVEN THOUGH THE STATUTE OF LIMITATIONS PREVENTS HIM FROM MAKING AN ADDITIONAL ASSESSMENT FOR THE YEAR INVOLVED

In acting upon the petitioners' claim for refund of income taxes for the taxable period, January 1 to December 12, 1920, the Commissioner of Internal Revenue reaudited the return, allowed the deduction of $16,870 for the State inheritance tax, which was the basis of the claim, but disallowed a deduc-

tion of $20,750 for attorney's fees which had previously been allowed. The result of this adjustment was the disclosure of an additional tax due which the Commissioner did not attempt to assess or collect because of the expiration of the period of limitation. The Commissioner merely rejected the claim for refund on the ground that, since more than the tax involved in the claim for refund was actually owing to the Government for taxes, there was no overpayment of taxes and no refund could be made.

The petitioners urge that the Commissioner was without authority to determine the question of overpayment by recomputing the tax or for this purpose to disallow deductions erroneously allowed because the statute of limitations barred any further assessment for that year.

Section 284 (a) of the Revenue Act of 1926, *infra,* which was in effect when the claim for refund in the instant case was filed and when it was rejected (except for amendments under the Revenue Act of 1928), does not in terms authorize the Commissioner of Internal Revenue to reaudit returns in connection with claims for refund. It does, however, expressly condition all refunds and credits upon overpayment of taxes imposed by statute. The same is true of the provisions of earlier Acts. See Section 281 (a) of the Revenue Act of 1924, *infra,* and Section 252 of the Revenue Acts of 1918 and 1921, *infra.*

Accordingly it has been the uniform practice of the Bureau of Internal Revenue to reaudit returns in connection with the filing of claims for refund, at least since 1918.[1] This practice was adopted as a matter of convenience to the taxpayer as well as to the Government. It serves to prevent the duplication of effort involved in allowing a refund and subsequently making a new assessment for the same year where the correct tax liability can be ascertained at the time of action upon the claim.

This practice has been followed in the belief that the various statutes authorizing refunds of income taxes did not authorize a refund in any case unless the amount paid exceeds the tax actually owing upon a true and correct computation of the taxable income for the year involved and that it was not the intention of Congress to authorize the refund of any tax which under the statute was required to be assessed and paid.

This conclusion follows from the language of Section 284 (a) of the Revenue Act of 1926, *infra*, p. 33, which provides for the allowance of a refund where there has been "an overpayment" of income

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[1] This practice has been followed at least since February 6, 1918, when General Mim. #1 was issued by the office of the Commissioner of Internal Revenue. It contained the following provision:

"13. In the examination of a claim which involves the consideration of items upon a return every item upon such return is to be carefully audited, and upon conclusion of the case the clerk who has handled the claim will write upon the return: 'Audited by ——— ' with his initials."

tax imposed by previous Acts and any balance remains after crediting such excess against any other taxes due but unpaid. Under earlier statutes also, refunds have been predicated upon overpayment of the taxes imposed by the statute. Section 281 (a) of the Revenue Act of 1924; Section 252 of the Revenue Act of 1921; Section 252 of the Revenue Act of 1918, all *infra*.[2]

The courts seem to have taken it for granted that the finding of an overpayment is necessary to establish the right to a refund. *United States* v. *Swift & Co.*, 282 U. S. 468; *Magee* v. *United States*, 37 F. (2d) 763 (C. Cls.), affirmed on other grounds, 282 U. S. 432; *McCarl* v. *United States ex rel. Leland* (App. D. C.), 42 F. (2d) 346, certiorari denied, 282 U. S. 839. Conversely, no recovery can be had of an amount erroneously refunded without establishing that the original assessment was valid. *United States* v. *Pusey*, 47 F. (2d) 22 (C. C. A. 9th).

The court below held that there had been no overpayment of tax in this case since the correct tax was in excess of that paid. The petitioners do not contend that the deduction for attorney's fees which the Commissioner disallowed when he re-

[2] The 1918 and 1921 Acts speak of an amount of tax paid in excess of that properly due and the 1924 and 1926 Acts speak of the overpayment of taxes imposed by the statutes. Obviously the phraseology of the later Acts is merely a simplified expression of equivalent phrases in the earlier statutes.

jected the claim for refund constituted an allowable deduction, nor do they deny that the computation of the tax resulting from the disallowance of this item and the allowance of the deduction for the State inheritance tax and other small items is a correct computation. Their contention is merely that the Commissioner in determining whether to make a refund for 1920 had no power to recompute the correct tax and disallow this item which he had erroneously allowed in assessing the tax, because the statute of limitations barred any additional assessment for that year.

Certainly if the statute of limitations had not been involved the Commissioner could have recomputed the tax and based the rejection of the claim for refund upon the disallowance of a deduction which was not involved in the claim. Under such circumstances the case would come within the general rule that in the absence of a closing agreement, and so long as the statute of limitations has not run, the Commissioner may make redeterminations of tax liability. *Burnet* v. *Porter,* 283 U. S. 230. See also *Botany Mills* v. *United States,* 278 U. S. 282.

The right to make a redetermination in connection with a claim for refund to ascertain whether there is a net balance in favor of the taxpayer to be refunded, seems to us to be unaffected by the fact that the statute of limitations has run against

any additional assessment. The running of the statute of limitations as to assessments does not do away with the necessity of determining whether there has been an overpayment before any amount is refunded. It bars the assessment and collection of any additional tax found due, but does not affect the Commissioner's right to retain a tax which has already been assessed and collected before collection was barred by limitation.

This conclusion follows from the fact that there is no statutory period of limitation which relates to a case of this character. Section 277 (a) (3) of the Revenue Act of 1926, *infra,* provides that taxes imposed under the Revenue Act of 1918 "shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period." The corresponding provisions of the Revenue Acts of 1921 and 1924 are similar. In this case there was no assessment or collection of taxes barred by the statute and the limitation which the statute imposes can have no application. The statute does not provide that after the statute of limitations has run against assessment for a given year the Commissioner may not retain a tax already collected when an audit of the return shows a tax due in excess of that paid. The statute is a limitation solely upon assessments and proceedings to collect. It does

not require the return of a payment on account of tax liability for the particular year, made before the statute had run, when that amount or more was actually owed for taxes for that year.

The rule that the entire tax liability is to be considered in passing on a claim for refund is supported by decisions which recognize that a taxpayer can not sue to recover taxes paid for a given year where there is or may be an additional tax due. In *Suhr* v. *United States,* 18 F. (2d) 81, (C. C. A. 3rd), a taxpayer brought suit to recover a part of an income tax erroneously paid for the year 1917 by virtue of the inclusion in taxable income of stock dividends. Three weeks before the suit was instituted he had filed with the Board of Tax Appeals a petition to review a deficiency for 1917, determined by the Commissioner as the result of adjustments in other items after eliminating the stock dividends from taxable income. The court held that the suit was instituted prematurely, that whether the taxpayer owed or had overpaid its tax liability for 1917 could not be determined without considering the whole question of its tax liability. The court said (p. 82):

> The fact that plaintiff was entitled to a refund of the stock dividends did not give him authority to resort to the courts if he owed the Government any taxes for that year. He was simply entitled to have the overpayment credited against his other tax liability.

Section 252 Revenue Act of 1921 (42 Stat. 227); *Blair* v. *U. S. ex rel. Birkenstock*, 271 U. S. 348.[3]

The converse of the situation in the *Suhr* case was presented in *Camp* v. *United States*, 44 F. (2d) 126 (C. C. A. 4th), and *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144 (C. Cls.). In those cases the institution of a suit preceded the assertion of the deficiency for the same year by the Commissioner. In the *Ohio Steel Foundry* case, *supra*, the Court of Claims held that it was not deprived of jurisdiction which it had already acquired, but that if the suit had followed the deficiency letter the suit would have been premature, as the taxpayer would be required to raise all questions regarding its tax liability before the Board. On the other hand, in the *Camp* case, *supra*, while the court held that it had jurisdiction, it remanded the case so as to permit the court below to decide whether to stay the proceeding pending a decision by the Board.[4] But see *Old Colony R. Co.* v. *United States*, 27 F. (2d) 994 (D. C. Mass.).

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[3] The reference to Section 252 is erroneous. See the decision in *Blair* v. *Birkenstock*, 271 U. S. 348.

[4] Neither the *Camp* case nor the *Ohio Steel Foundry* case involved an appeal taken to the Board under the Revenue Act of 1924 and undecided at the time of the passage of the Revenue Act of 1926, so that no question of the right to institute a suit in a District Court following the Board's decision was involved. See *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716.

There is no material difference between attempting to recover by means of a claim for refund and by means of a suit, since the rejection of the former (affirmatively or by inaction) must precede the latter under Section 3226 of the Revised Statutes, *infra*. Hence the decisions cited support our view that it is not only permissible but desirable that the finding of a refund and a deficiency for the same year should be avoided, and that the entire tax liability for a particular year should be dealt with at one time whenever possible.

That Congress has thought it desirable to settle all questions between the taxpayer and the Government that may be raised as to tax liability for a given year in a single controversy where it is possible to do so is further illustrated by provisions in the Revenue Act of 1926 requiring the Commissioner to consider previous refunds in determining the amount of a deficiency. See Sections 273 and 307 of the Revenue Act of 1926. *Levy* v. *Commissioner*, 48 F. (2d) 725 (C. C. A. 9th).

We submit, therefore, that when a claim for refund is filed by a taxpayer, setting forth certain facts and advancing supporting arguments, it is the duty of the Commissioner of Internal Revenue to determine whether an excess payment has been made by the taxpayer. In determining whether the taxpayer has made an excess payment the Commissioner is not confined to the issues raised in the claim for refund. That claim must specifi-

cally indicate the error upon which the taxpayer relies to show what inquiry should be made to permit a determination upon the claim, but that specification can not limit the scope of the Commissioner's inquiry. He is not required to close his eyes to all other facts and to all other questions which may come to his attention. He may completely audit the return and make any changes in his former rulings that he finds proper. Indeed, the true tax liability of the taxpayer can not be ascertained otherwise, for the tax is not based on any particular item of income but upon a net income determined after giving consideration to all sources of income and to all deductions and exemptions that are proper. A taxpayer's liability for a given year is a unit. See *Blair* v. *Birkenstock, supra.*

The rule that tax statutes are to be liberally construed in favor of the taxpayer has its limitations. It should not be applied to extend the protection of the statute of limitations to a situation to which that statute is not by its terms or necessary implication made applicable.

Many decisions recognize that ordinarily the running of a statute of limitations bars the remedy but does not extinguish the liability. *United States* v. *Whyel,* 28 F. (2d) 30 (C. C. A. 3d), certiorari dismissed, 278 U. S. 664; *Wright & Taylor* v. *Lucas,* 34 F. (2d) 328, affirmed, 45 F. (2d) 75 (C. C. A. 6th), affirmed, 282 U. S. 409; *Mascot Oil*

Co. v. *United States,* 42 F. (2d) 309 (C. Cls.), affirmed, 282 U. S. 434; *United States* v. *John Barth Co.,* 27 F. (2d) (C. C. A. 7th), reversed on other grounds, 279 U. S. 370. These decisions follow the rule as to debts in general in the absence of a contrary intent disclosed by the statute. *Campbell* v. *Holt,* 115 U. S. 620; *William Danzer Co. v. Gulf R. R.,* 268 U. S. 633. The principle that the liability survives even though the remedy may be barred, is also illustrated by the decisions holding that a waiver given after the expiration of the statute is valid. *Stange* v. *United States,* 282 U. S. 270; *Burnet* v. *Railway Equipment Co.,* 282 U. S. 295.

The Commissioner has merely taken both items into account in determining whether there was an overpayment and whether a refund should be made.

The petitioners contend that the respondent is actually in the position of asserting a counterclaim, although none is pleaded, and that the claim thus asserted is barred by the statute of limitations. But this is an incorrect analysis of the case. The burden is on the petitioners to show an overpayment and, since the action is essentially one for money had and received, that the respondent retains money to which they are, in equity and good conscience, entitled. Since the tax liability was greater than the amount retained, they have failed to sustain this burden, and the decision of the court below was, therefore, clearly right.

II

THE CASE DOES NOT INVOLVE ANY ATTEMPT ON THE PART OF THE COMMISSIONER TO CREDIT AN OVERPAYMENT AGAINST AN OUTLAWED ASSESSMENT OR TO ASSERT A DEFICIENCY WITHOUT GIVING AN OPPORTUNITY FOR A HEARING

The petitioners contend that the Commissioner's action in rejecting the claim for refund, on the ground that, while the deduction in dispute was allowable a larger item previously allowed as a deduction should have been disallowed, was tantamount to an attempt to credit an overpayment against a tax, the assessment of which was barred by the statute of limitations. They urge that the prohibition in Sections 607 and 609 of the Revenue Act of 1928, *infra,* against setting off an overpayment against a barred tax liability applies whether the barred liability is for the same year or another year. They argue that the sections just referred to and the decisions in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Western Wholesale Drug Co.* v. *United States,* 47 F. (2d) 770 (S. D. Cal.), establish that the credit in this case was made without statutory authority. See also *Graham & Foster* v. *Goodcell,* 282 U. S. 409.

But Section 609 must necessarily be construed in conjunction with the provisions of the various Acts authorizing credits, and when so construed it is clear that it relates only to a credit for an overpayment for one year against a liability for another year.

Section 252 of the Revenue Act of 1918, *infra*, p. 27, provides that if upon an examination of any return of income made under that or previous Acts, the Commissioner finds that an amount of income tax, war-profits, or excess-profits tax has been paid in excess of that properly due then the amount of the excess—

> shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer *under any other return*, and any balance of such excess shall be immediately refunded to the taxpayer: * * *. (Italics ours.)

Section 252 of the Revenue Act of 1921 contains identical language. That section was amended by the Act of March 4, 1923, but not in any way material here. Under these provisions there can be no doubt that a credit for an overpayment could only be made against a tax for another year.

In *Blair* v. *Birkenstock, supra,* this Court held that an excessive payment of an installment of tax for a given year was to be applied as a payment on installments not yet due for that year, but was not to be regarded as a credit within the meaning of Section 252 of the Revenue Act of 1918. The Bureau of Internal Revenue has consistently construed Section 252 of the Revenue Acts of 1918 and 1921 as relating only to credits against taxes due for another year. In I. T. 1447, C. B. I–2, p. 220, it was asserted that the purpose of Section 252 was to permit an adjudication of tax liability by the Com-

missioner without the necessity of the taxpayer filing a claim for refund and immediately repaying the refund to satisfy taxes due for another year. That this was the extent of the authority for credits in Section 252 of the Revenue Acts of 1918 and 1921 is also recognized in T. D. 3260, C. B. 5, p. 243; A. R. M. 123, C. B. 4, p. 330; Sol. Op. 79, C. B. 3, p. 302.

In Section 281 (a) of the Revenue Act of 1924, *infra*, p. 30, the language relating to credits was changed to read that if there had been an overpayment of any tax imposed by that Act or certain prior Acts the amount of such overpayment—

> shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

It will be noted that the phrase "under any other return" is omitted from this provision. It is also omitted from Section 284 (a) of the Revenue Act of 1926, *infra*, p. 33, but these omissions appear to have no significance. The Act of 1924 has been construed by the Treasury Department as if the phrase were implied. See Article 1304 of Regulations 65, *infra*, p. 36. The readoption of the same provision in the Act of 1926 after administrative construction imports legislative approval of the construction. *Brewster* v. *Gage*, 280 U. S. 327. Moreover, an examination of the reports of the Congressional committees which were responsible for the change

in the provision in the Revenue Act of 1924 reveals no discussion of the omission of this phrase, though other changes in the same section were discussed. See H. R. 179, 68th Cong., 1st Sess., p. 27; S. R. 398, 68th Cong., 1st Sess., p. 33; Conf. Rep. No. 884, 68th Cong., 1st Sess., pp. 24–25.

It seems clear under the statutes and regulations that the credit which is regarded as an overpayment under Section 609 (a) of the Revenue Act of 1928 is a credit of an overpayment for one year against an outlawed assessment for another year.

Apart from the statutes and regulations, the administrative practice as to allowance of credits supports this view. This practice is described in detail in *United States* v. *Swift & Co.*, 282 U. S. 468, where this Court had to determine the time when a credit is allowed. The Court quoted instructions on the schedule of overassessments then in use as follows (pp. 471–472):

> You will immediately check the items therein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.
>
> If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's ac-

count for subsequent periods. (This applies to income, war-profits, and excess-profits taxes only.)

It is submitted that Section 609 has no application to this case.

Nor do we consider that *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, has any possible application here. That decision involved an action to recover the amount of an overpayment of income tax for the fiscal year ended January 31, 1919. The Government filed a counterclaim for the amount of a check sent to the plaintiff in payment of the balance of the refund remaining after deducting a part to pay an additional tax for the year ended January 31, 1917, which was barred by the statute of limitations. The question was whether the taxpayer's right to recover was barred by the statute of limitations and involved in part a construction of Section 281 (a) of the Revenue Act of 1924, as amended, relating to the effect of certain waivers of the period of limitations on refunds. The Court emphasized the fact that the Commissioner had notified the taxpayer of the overassessment shortly after the enactment of the amendment and had advised it of the necessity of filing a waiver in accordance with the provisions of the amendment without at the same time advising it of the necessity for filing a claim for refund. The Court therefore held that the waiver which was subsequently filed (considered in the light of surrounding circumstances) should

be regarded as an adequate claim, and, further, that a suit based upon a determination and certification by the Commissioner that taxpayer was entitled to a refund of a specified amount was not barred by the lapse of five years from the payment of the tax.

In the *Western Wholesale Drug Company* case, 47 F. (2d) 770, 1919 taxes had been paid partly in cash and partly by the application of a credit for an overpayment of 1920 taxes. The taxpayer subsequently filed a claim for refund of 1919 taxes and the Commissioner in acting upon this claim attempted to reduce the amount allowed by part of the credit previously allowed on the ground that additional taxes were due for 1920. The court held that this could not be done, as the credit which had been made constituted payment of 1919 taxes and the correctness of the 1920 assessment was not in issue. Clearly, for reasons which have already been stated, the question involved in that case is wholly different from the question here, where a single taxable year is involved.

Nor can any objection to the Commissioner's action in rejecting the claim for refund be predicated on the assertion that the Commissioner has thus redetermined a tax without giving the petitioners the notice prescribed in Sections 274 (a) and 283 (a) of the Revenue Act of 1926, *infra*, pp. 31, 32, and without giving him the statutory remedy of appeal from the assessment to the Board of Tax Appeals.

The Commissioner in this case has not attempted to assert a deficiency in tax. He has acknowledged his inability to do so because of the running of the statute of limitations. It is only in case of a deficiency in tax that the sending of a sixty-day letter giving the taxpayer the right of appeal to the Board is required. Section 274 (a) of the Revenue Act of 1926, *infra*, p. 31. The Commissioner is merely seeking to retain that which has already been paid; he is not claiming an additional payment. Hence, the petitioners have not been deprived of any right of appeal to the Board of Tax Appeals, to which they are entitled under the statute.

In this connection it should be noted that if the taxpayer had desired to secure a judicial review of the question whether the deduction for attorney's fees should have been allowed he could have done so. All that was required was that he file another claim for refund relating to that item and upon its rejection sue to recover the tax paid. There was ample time within which to take this step. The original claim was rejected May 18, 1929. (R. 22.) The tax was paid on March 20, 1926, and the taxpayer had until March 20, 1930, within which to file another claim. Section 284 (b) of the Revenue Act of 1926, *infra*, p. 33.

The taxpayer also had the opportunity to litigate in this action the deductibility of the item of attorney's fees by proper pleading and proof. Had he prevailed in that respect he would have established his right to the refund here claimed.

III

EVEN IF THE COMMISSIONER'S ACTION IN REJECTING THE CLAIM FOR REFUND AS THE RESULT OF DISALLOWING THE ITEM FOR ATTORNEY'S FEES WAS ERRONEOUS, PETITIONERS CAN NOT RECOVER IN THIS SUIT

In view of the fact that the Commissioner has not collected any tax in excess of that due under a correct computation, the petitioners can not recover in this suit against the Collector.

In *Champ Spring Co.* v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852, the Government had refunded certain excise taxes which under the decision of this Court in *Universal Battery Co.* v. *United States,* 281 U. S. 580, should not have been refunded. The Government attempted to make another assessment of the amount refunded and demanded payment. It succeeded in collecting the amount by duress after the right to collect was barred by the statute of limitations. The taxpayer later sued to recover in an action under the Tucker Act. The court held that the action could not be maintained since the action was one for money had and received and, upon familiar principles, that it can be maintained only when the defendant has money which in equity should be paid to the plaintiff. The court there said (pp. 2–3):

> In the view we take of the issues, it is not necessary to determine whether the collector of internal revenue had authority to make the reassessment. As has been observed the plaintiff's action is in the nature of a suit

for money had and received. While this is an action at law, it is nevertheless governed by equitable principles, and it can be maintained only when one has money in his hands belonging to another, which in equity and good conscience he ought to pay over to that other. The issue in this case is: To whom does the money in equity, justice, and good conscience belong? If the plaintiff fails to show that it has a superior right to that of the defendant, it can not recover. [Cases cited.]

* * * * *

It was therefore incumbent upon the plaintiff, to entitle it to recover, to show, not that the defendant had by some illegal method secured these funds, but that the plaintiff had a better right to them than the defendant. The funds were erroneously refunded to plaintiff by an officer of the government. They confessedly belonged to the government. It can not therefore be said that in equity and good conscience the plaintiff, as against the defendant, was entitled to this money. Before it could recover, it must show a better right thereto than that of the government, and this it has failed to do. If the plaintiff has suffered any damage by reason of the wrongful acts of the revenue officers in resorting to distraint instead of resorting to an action at law, it has its remedy, but the mere fact of such irregularity does not create in the plaintiff, in equity and good conscience, a right to recover these funds.

An action against the Collector to recover taxes paid is also an action for money had and received (*City of Philadelphia* v. *The Collector,* 5 Wall. 720) and the taxpayer may recover only such money as he is equitably entitled to receive. *J. W. Carter Music Co.* v. *Bass,* 20 F. (2d) 390 (S. D. Tex.); *New York Life Ins. Co.* v. *Anderson,* 263 Fed. 527 (C. C. A. 2d), certiorari denied, 256 U. S. 696.

In addition to holding that the petitioners had failed to establish an overpayment, we submit that the court below correctly held that this was an action for money had and received and that petitioners could not recover because they had failed to establish that the respondent had money which in equity and good conscience belonged to petitioners.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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NOVEMBER, 1931.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085:

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess profits taxes, or in-

stallment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, 268:

SEC. 250. (d) The amount of income, excess profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

SEC. 252.[5] That if, upon examination of any return of income made pursuant to this Act, * * * or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, 343:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of

[5] This section was amended by the Act of March 4, 1923, c. 276, 42 Stat. 1504, and the Act of March 13, 1924, c. 55, 43 Stat. 22, but not in any way material here.

1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer. (U. S. C., Title 26, Section 1065.)

SEC. 1014.[6] (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, pen-

[6] This section was reenacted without change in Section 1113 of the Revenue Act of 1926. (U. S. C. Sup. IV, Title 26, Sec. 156.)

alty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act. (U. S. C., Title 26, Section 156.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 58, 63, 66:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition

has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. (U. S. C., Sup. IV, Title 26, Section 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Sup. IV, Title 26, Section 1057.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person

liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act. (U. S. C., Sup. IV, Title 26, Section 1064.)

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer. (U. S. C., Sup. IV, Title 26, Section 1065.)

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax

imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, 878:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. U. S. C., Sup. IV, Title 26, Section 2607.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commis-

sioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspending the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Sup. IV, Title 26, Section 2608.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C., Sup. IV, Title 26, Section 2609.)

SEC. 619. MINOR ADMINISTRATIVE AMENDMENTS.

* * * * *

(b) Section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926, is amended by striking out "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926"

and inserting in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." (U. S. C., Sup. IV, Title 26, Section 149.)

Treasury Regulations 65:

ART. 1304. *Claims for credit of taxes erroneously collected.*—Any amount of income, war-profits, or excess-profits tax paid in excess of that properly due shall be credited against any such taxes due from the taxpayer under any other return. To obtain such credit, the taxpayer should proceed as follows:

(1) Where the credit demanded is equal to or less than any outstanding assessment of tax, a taxpayer desiring to obtain such credit shall file with the collector charged with the assessment of the tax against which the credit is desired a claim on Form 843 which shall be sworn to and shall contain the following statements: (a) business engaged in by the claimant, (b) character of assessment of tax, (c) amount of tax claimed as a credit, (d) unpaid assessment against which credit is asked and for what taxable year, and (e) all facts regarding the overpayment.

(2) Where the amount claimed as a credit is greater than the outstanding assessment of tax, a taxpayer desiring to obtain such credit and the refund to which he is entitled shall file Form 843, stating thereon the respective amounts claimed as a credit or as a refund. See article 1306. All facts regarding the total overpayment should be stated in the claim.

U. S. GOVERNMENT PRINTING OFFICE: 1931

JAN 27 1932
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1931

EDGAR PERCY LEWIS AND RICHARD F. COOPER As Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REHEARING

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, As Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REHEARING

Petitioners respectfully ask for a rehearing.

In the opinion it is said:

> "Counsel for petitioners * * * maintains that the Commissioner lacked authority to redetermine and reassess the tax after the statute had run."

This is a correct statement of the contention.

It is further said in the opinion that counsel also maintains:

> "that at the time of his (the Commissioner's) last decision he was restricted to consideration of the demand for refund and determination of whether the trustees were entitled to deduct the state inheritance taxes."

While the respondent's brief seems to attribute this position to the petitioners, no such contention has been made by them. Throughout the case in all courts it has been disclaimed—specifically in the paragraph at the top of page 6 of petitioners' brief in this court; and twice in response to questions on the oral argument.

The question of the burden of proof on which the case turned in the lower courts depends wholly upon the legal effect given to the Commissioner's letter refusing payment. If that supersedes the assessment and conditions the tax, the decision is right. If, on the other hand, the assessment conditions the tax, it seems to us that the finding therein that the attorney's fees were a business expense, and therefore deductible, made a *prima facie* case for recovery and put the burden on the defendant to show a tax liability notwithstanding the finding and assessment.

When the government insists upon a tax "which might have been properly assessed and demanded," as the opinion properly describes it, we think the burden is on the government to prove the liability by some other evidence than the letter refusing a refund.

A tax may be collected by assessment. In such case the assessment is *prima facie* proof of the legality of of the tax assessed. A tax may be collected by suit without assessment. But in such case the burden of proof is on the government.

Little Miami, etc., R. Co., v. U. S., 108 U. S. 277

Respectfully submitted,

N. E. CORTHELL, *Attorney and of Counsel for Petitioners*

I certify that the foregoing petition is presented in good faith and not for delay.

N. E. CORTHELL, *Attorney and of Counsel for Petitioners*

Laramie, Wyoming
January 23, 1932

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 115.—October Term, 1931.

Edgar Percy Lewis and Richard F. Cooper, as Trustees under the Will of Arthur Francis Thomas Cooper, Deceased, Petitioners,
vs.
Marshall S. Reynolds, Individually and as Collector of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[January 4, 1932.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners sued the respondent Collector in the United States District Court for Wyoming, September 20, 1929, to recover $7,297.16 alleged to have been wrongfully exacted as income tax upon the estate of Cooper.

February 18, 1921, the administrator filed a return for the period January 1 to December 12, 1920, the day of final settlement. Among others, he reported deductions for attorney's fees, $20,750, and inheritance taxes paid to the State, $16,870. The amount of tax as indicated by the return was paid.

November 24, 1925, the Commissioner, having audited the return, disallowed all deductions except the one for attorney's fees and assessed a deficiency of $7,297.16. This sum was paid March 21, 1926; and on July 27, 1926, petitioners asked that it be refunded.

A letter from the Commissioner to petitioners, dated May 18, 1929, and introduced in evidence by them, stated that the deduction of $20,750 for attorney's fees had been improperly allowed. He also set out a revised computation wherein he deducted the State inheritance taxes. This showed liability greater than the total sums theretofore exacted. The Commissioner further said: "Since the correct computation results in an additional tax as indicated above which is barred from assessment by the statute of limitations your claim will be rejected on the next schedule to be approved by the commissioner."

The trial court upheld the Commissioner's action and its judgment was affirmed by the Circuit Court of Appeals.

Counsel for petitioners relies upon the five year statute of limitations (Rev. Act 1926, Sec. 277)*. He maintains that the Commissioner lacked authority to redetermine and reassess the tax after the statute had run [~~for that at the time of his last decision he was restricted to consideration of the demand for refund and determination of whether the trustees were entitled to deduct the State inheritance taxes~~].

After referring to Sec. 284, Revenue Act of 1926, 44 Stat. 66, and Sec. 322, Revenue Act of 1928, 45 Stat. 861, the Circuit Court of Appeals said—

> "The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

We agree with the conclusion reached by the courts below.

While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

Bowit Teller & Co. v. *United States*, 283 U. S. —, says nothing in conflict with the view which we now approve.

Affirmed.

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*Sec. 277. (a) Except as provided in section 278 [not here important]— . . . (3) The amount of income, excess-profits, and war-profits taxes imposed by . . . the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.